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No. ___

IN THE

Supreme Court of the United States

THE BOARD OF COUNTY COMMISSIONERS
OF THE COUNTY OF EL PASO and TERRY MAKETA,
in his official capacity as Sheriff of El Paso County,
Petitioners,

v.

MARK SHOOK and DENNIS JONES, on behalf of themselves
and all others similarly situated, and JAMES VAUGHAN
and SHIRLEN MOSBY,
Respondents.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
- for the Tenth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Observing an increase in prisoner litigation and the federal courts' involvement in broad system-wide attempts at jail and prison oversight and reform, Congress enacted the Prison Litigation Reform Act of 1995 ("PLRA"). One of the key provisions of the PLRA restricted "[p]rospective relief in any civil action with respect to prison conditions" to "no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs." 18 U.S.C. § 3626(a)(1)(A).

The district court, finding that it was "apparent" that the prisoner class action complaint was an "effort to reform jail practices rather than to redress past constitutional torts and prevent their reoccurrence" and that the "objective of this proposed class action is to have this court prescribe jail practices for humane treatment of prisoners," denied the prisoners' Fed.R.Civ.P. 23(b)(2) motion for class certification (App. 26a, 28a). As part of its class certification analysis, the district court considered, in part, its inability to adequately identify members of the class and that the relief sought was beyond that permitted by the PLRA and was inconsistent with "[t]he evident purpose of the PLRA [which] was to emphasize the functional difference between the judiciary and the agencies of representative government." (App. 28a.)

The United States Court of Appeals for the Tenth Circuit found that the PLRA did not change the landscape for class certification analysis and that the district court improperly interpreted the PLRA to permit consideration of the identifiability of class members and the class relief requested (App. 9a -10a). The question presented, therefore, is:

> Does the opinion of the Tenth Circuit impermissibly undermine the language of the Prison Litigation Reform Act and the intent of Congress in holding that a court may not consider the identifiability of class members nor the class relief requested in its Fed.R.Civ.P. 23(b)(2)

class certification analysis of a proposed prisoner class where, as found by the district court, it was apparent that the action was "an effort to reform jail practices rather than to redress past constitutional torts and prevent their reoccurrence."

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PETITION FOR A WRIT OF CERTIORARI

The Board of County Commissioners of the County of El Paso and Terry Maketa, in his official capacity as Sheriff of El Paso County, Petitioners, respectfully petition for a writ of certiorari to review the opinion of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The July 29, 2003, order denying class certification and denying motion to dismiss or for summary judgment of the United States District Court for the District of Colorado is reported at *Shook v. Board of County Comm'rs of County of*

El Paso, 216 F.R.D. 644 (D.Colo. 2003), and is reproduced at App. 21a. The October 18, 2004, opinion of the United States Court of Appeals for the Tenth Circuit on the merits is reported at *Shook v. El Paso County*, 386 F.3d 963 (10th Cir. 2004), and is reproduced at App. 2a. The December 8, 2004, order of the Tenth Circuit denying Petitioners' timely request for rehearing en banc remains unreported. (App. 1a.)

JURISDICTION

The United States Court of Appeals for the Tenth Circuit issued its opinion on October 18, 2004. The Tenth Circuit entered its order denying Petitioners' timely request for rehearing en banc on December 8, 2004. The jurisdiction of the Tenth Circuit was invoked pursuant to 28 U.S.C. § 1291. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). Further, pursuant to Supreme Court Rule 10(c), the question presented herein sets out an important question of federal law which has not been, but should be, settled by this Court.

RELEVANT CODE AND RULE PROVISIONS

18 U.S.C. § 3626(a)(1)(A) provides:

> Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

Fed.R.Civ.P. 23(a) provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(b) provides:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the

> controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

STATEMENT OF THE CASE

A brief history of the Prison Litigation Reform Act of 1995 ("PLRA")[1] was set out in a 2002 University of Pennsylvania Law Review article as follows:

> Decades of criticism regarding prisoner litigation culminated in the Prison Litigation Reform Act of 1995 (PLRA). Taking advantage of the increased availability of civil rights claims under 42 U.S.C. § 1983, prisoners were one of the fastest growing plaintiff classes in the federal courts from 1960 to the present. In 1994, the year before members of Congress introduced the PLRA, prisoners filed 60,086 cases in the federal courts, making up more than one-fourth of the total number of civil cases filed nationally. In 1990, over 1,200 local prison systems, including those in major cities such as New York, Philadelphia, and Detroit, were under federal court supervision. For the most part, this supervision stemmed from class action suits spanning many years.

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[1] The PLRA is codified in various places within the United States Code. *See* Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified, in part, at 11 U.S.C. § 523(a) (bankruptcy—exceptions to discharge), 18 U.S.C. § 3624(b) (release of a prisoner), 18 U.S.C. § 3626 (appropriate remedies with respect to prison conditions), 28 U.S.C. § 1915 (proceedings in forma pauperis), and 42 U.S.C. § 1997e (suits by prisoners)).

> The rise in prisoner litigation and prospective relief calling for extensive court involvement in prisons generated significant negative attention. Prison administrators expressed frustration with judges taking on a "micro-managing" function in the remedy phase of meritorious cases.

A. Heidel, *Due Process Rights and the Termination of Consent Decrees Under the Prison Litigation Reform Act*, 4 U. Pa. J. Const. L. 561, 561-62 (2002) [footnotes omitted].

Congress, via the PLRA, established several limitations regarding prisoner cases. As relevant to this case, 18 U.S.C. § 3626(a)(1)(A) provides, in part:

> Prospective relief in any civil action with respect to prison conditions shall extend *no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs*. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. [Emphasis added.]

A 1997 Arizona Law Review article summarized the limiting intent and effect of the PLRA as follows:

> [T]he broad-based relief ordered as a result of prisoners' rights class actions has resulted in a congressional backlash. . . . The recently enacted Prison Litigation Reform Act [footnote omitted] *may have a substantial impact on future class action litigation*. The Act establishes several substantive restraints on court-ordered remedies in all civil litigation, including class actions, involving prison conditions based on federal rights.

J. Greenberg, *Civil Rights Class Actions: Procedural Means of Obtaining Substance*, 39 Ariz. L. Rev. 575, 579 (1997) [emphasis added].

This Court has voiced its own concern with regard to broad-based attempts at jail and prison oversight. In *Turner v. Safley*, 482 U.S. 78, 84-85 (1987), this Court recognized that:

> Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint.

In *Lewis v. Casey*, 518 U.S. 343, 364 (1996), Justice Thomas, in his concurring opinion, observed:

> The Constitution charges federal judges with deciding cases and controversies, not with running state prisons. Yet, too frequently, federal district courts in the name of the Constitution effect wholesale takeovers of state correctional facilities and run them by judicial decree. . . . Such gross overreaching by a federal district court simply cannot be tolerated in our federal system.

This position against court management of jails and prisons is embodied in the legislative history of the PLRA. At the Judiciary Committee hearing held on July 27, 1995, Senator Orrin G. Hatch from Utah stated:

> No one, of course, is suggesting that prison conditions that actually violate the Constitution should be allowed to persist. Nevertheless, I believe that the Federal courts have gone way too far in exercising their equitable remedial powers to micromanage our Nation's prisons at the expense of the proper role of the political branches and the States.
>
> As Justice Thomas suggested in his concurring opinion last term in *Missouri v. Jenkins* [515 U.S. 70, 126 (1995)], Congress has not exercised its power to define

> the remedial powers of the lower Federal courts. Perhaps unwittingly, it has allowed Federal judges to run school districts, prisons, and other public institutions, a function more properly exercised by legislatures and the executive branches.

Prison Reform: Enhancing the Effectiveness of Incarceration, 1995: Hearings on S. 3; S. 38; S. 400; S. 866; S. 930; H.R. 667 Before the Comm. on the Judiciary United States Senate, 104th Cong., 1st Sess. (1995) [hereinafter *Prison Reform: Enhancing the Effectiveness of Incarceration, 1995*] (statement of Orrin G. Hatch). Senator Richard C. Shelby from Alabama submitted a prepared statement at the hearing which provided, in part:

> [S]tates have been micro-managed by the *federal* courts which have mandated that states provide prisoners with every possible amenity imaginable. For example, Federal Judge William Wayne Justice of the Eastern District Court required scores of changes in the Texas prison system, designed to improve the living conditions of Texas prisoners. These changes increased Texas's prison operating expenses ten-fold, from $91 million in 1980 to $1.84 billion in 1994—even though the prison population only doubled. This legislation will empower state and local prison officials to operate their systems in a cost-efficient manner, and will give them the much needed protection from the overreaching federal courts.

Prison Reform: Enhancing the Effectiveness of Incarceration, 1995 (prepared statement of Richard C. Shelby). Senator Kay Bailey Hutchison from Texas also spoke at the hearing regarding her Stop Turning Out Prisoners ("STOP") Act, which ultimately formed part of the PLRA, as follows:

> My STOP bill would prevent more *Ruiz* [*v. Estelle*, 679 F.2d 1115 (5th Cir. 1982)] decisions. It would limit relief in a civil action regarding prison conditions to extend no further than necessary to grant relief. . . . Furthermore, the courts would not be able to use a single

lawsuit as a springboard to take over the administration of an entire prison system.

Prison Reform: Enhancing the Effectiveness of Incarceration, 1995 (statement of Kay Bailey Hutchison). Former United States Attorney General William P. Barr submitted a written statement that discussed certain guidelines he set forth as Attorney General in 1992 to govern the Justice Department's involvement in prison litigation and argued that these guidelines were also appropriate for legislative reform in the area of prisoner litigation. These guidelines turned out to be markedly similar to the prison litigation reform legislation ultimately adopted by Congress. Two relevant guidelines discussed by Barr were the following:

> *First*, as the Supreme Court has recently made clear in cases such as *Wilson v. Seiter* [501 U.S. 294 (1991)], the Federal courts have no authority to hold that prison conditions are unconstitutional unless it is proven that prison officials have acted with "deliberate indifference" to "the minimal civilized measure of life's necessities." It is not an eighth amendment violation merely because the overall conditions in a prison are bad or substandard where no specific deprivation of a human need is demonstrated.
>
> Accordingly, I directed that the Department should not initiate p[r]ison litigation or intervene in on-going prison litigation, unless necessary to remedy specific deprivation of a prisoner's basic human needs—deprivations that rise to the level of cruel and unusual punishment.
>
> . . . .
>
> *Third*, the business of running prisons belong to the appropriate State officials, not to Federal judges, Justice Department officials, or special masters. The fact that a court finds a constitutional violation does not justify court or Justice Department supervision of prisons either direct or through the appointment of a special master. The duty to vindicate inmates' constitutional rights does

> not confer on the courts or the Justice Department the power to manage prisons. Where a court finds a constitutional violation, it should give the State an appropriate opportunity to remedy the violation without ordering more specific relief and without attempting to take control of the State prison system.
>
> Therefore, I directed that the Department of Justice should not encourage or support court supervision of State prisons, either directly or by the appointment of a special master, except as a last resort where it was plainly necessary to remedy a continuing constitutional violation that a state failed to remedy.

Prison Reform: Enhancing the Effectiveness of Incarceration, 1995 (prepared statement of William P. Barr).

Against the backdrop of the PLRA and this Court's disfavor of attempts to judicially impose broad system-wide reform on state jails and prisons, plaintiffs, through the ACLU Prison Project, filed their complaint here. An examination of the complaint reveals that plaintiffs sought to judicially impose broad system-wide injunctive relief to:

> Permanently enjoin defendants, their subordinates, agents, employees, and all others acting in concert with them from subjecting plaintiffs and the plaintiff class to the conditions set forth in this Complaint.

(App. 53a ¶ 77.) In turn, the "conditions" set forth in the complaint were numerous, extremely broad, varied, and, in many cases, vague. They included areas such as lack of adequate housing and overcrowding (App. 35a-36a ¶¶ 17, 20); lack of adequate inpatient care (App. 39a ¶ 31); unavailability of mental health facilities for mentally ill women inmates (App. 36a ¶ 22); use of special detention cells (App. 37a ¶¶ 24-25); use of pepper spray (App. 40a ¶ 34); use of restraints (App. 40a-41a ¶¶ 33, 35); lack of protection from self-harm and suicide (App. 35a ¶ 17); lack of an adequate system for distributing medication (App. 41a-43a ¶¶ 36-41); and lack of adequate mental health staffing (App. 38a ¶ 30).

In seeking to certify a class, plaintiffs described the proposed class as all current or future inmates in the El Paso County Jail "with serious mental health needs." (App. 55a.)

The district court recognized that class actions could be maintained under the PLRA but, aware of the changed landscape of prison claims under the PLRA, observed:

> It is apparent from the plaintiffs' papers that this civil action is an effort to reform jail practices rather than to redress past constitutional torts and prevent their reoccurrence.

(App. 26a.) The district court further observed that:

> The initial problem in this case *is the identification of members of the class*. . . . National statistics suggest that approximately 20% of the prison population in the United States are persons with mental health needs. Jail populations are inherently fluid and the time in custody varies greatly. . . . The identification of members of the class in this case necessarily would require an intake diagnostic procedure to determine persons having serious mental health needs. To find deliberate indifference to serious mental health needs there must be an awareness by the custodial authority that a prisoner has such needs. . . . There is nothing in the Constitution that requires the Sheriff of El Paso County to hire a competent professional staff to screen all persons coming to the jail to determine their mental and emotional status.

(App. 26a-27a [emphasis added].)

As to the intent of the PLRA and its impact on plaintiffs' request for class certification, the district court wrote:

> The objective of this proposed class action is to have this court prescribe jail practices for humane treatment of prisoners. That is beyond the competence and the jurisdiction of this court. . . . The *evident purpose of the PLRA was to emphasize the functional difference*

> *between the judiciary and the agencies of representative government.* The limitations on remedy established by the PLRA would preclude this court from replicating *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980).[2]

(App. 28a [emphasis added].)

On the issue of whether identifiability is a proper consideration in a class certification analysis of a proposed prisoner class under Fed.R.Civ.P. 23(b)(2), the Tenth Circuit held that it could not be considered as a factor:

> Regarding identifiability, the district court's order specifically states that "[t]he initial problem in this case is the identification of members of the class." *Shook*, 216 F.R.D. at 647-48. However, while the lack of identifiability is a factor that may defeat Rule 23(b)(3) class certification, such is not the case with respect to class certification under Rule 23(b)(2).

(App. 15a.) With regard to the issue of whether the PLRA permitted the district court to consider the class relief requested, the Tenth Circuit wrote:

> The district court's analysis of the PLRA centered around the following provision that limits prospective relief in cases involving prison conditions:

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[2] *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980), involved a class action brought by inmates for alleged constitutional violations of their rights arising from prison conditions. The inmates alleged that "the totality of the conditions" at the prison violated various constitutional rights of the inmates confined in that facility. 639 F.2d at 562. The inmates' complaints were several and varied and included complaints about shelter and sanitation, food, personal safety, health care, restrictions on visitation, restrictions on inmate mail, and access to the courts. The district court held that the inmates' constitutional rights were being violated and ordered that the prison be closed. On appeal, the Tenth Circuit vacated the district court's remedial order and remanded for further proceedings so the district court could consider the fact that a new prison was already under construction.

> Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.
>
> 18 U.S.C. § 3626(a)(1)(A).
>
> While the court determined that this provision did not entirely prohibit class action certification, it held that it did constitute a significant limitation on its jurisdiction to entertain class action suits by prisoners. *Shook*, 216 F.R.D. at 646. The question for us, then, is whether courts may consider the relief the prisoners seek in determining whether to certify a class under the PLRA. Our review of the PLRA leads us to conclude that it does not limit class certification decisions in this way.

(App. 9a-10a.)

In reaching its conclusion, and without analysis of the express language of the PLRA limiting consideration of actions to "the violation of the Federal right of a particular plaintiff or plaintiffs" or to the legislative history, the Tenth Circuit held that the "text of the PLRA says nothing about the certification of class actions. Based on the statute's absence of direction in that area, we presume that Congress intended to leave Rule 23 intact." (App. 10a.)

REASONS FOR GRANTING THE WRIT

The Tenth Circuit has seriously undermined the PLRA and the intent of Congress in holding that a court may not consider the identifiability of class members nor the class relief requested in its Fed.R.Civ.P. 23(b)(2) class certification analysis.

It is Petitioners' position that the opinion of the Tenth Circuit eviscerates the clear language and intent of the PLRA that requires challenges to prison conditions to be on the basis of specific constitutional violations of identifiable plaintiffs. It is Petitioners' position that the PLRA expressly restricts consideration of civil actions unless they are addressed to the correction of "the violation of the Federal right *of a particular plaintiff or plaintiffs*." 18 U.S.C. § 3626(a)(1)(A) [emphasis added]. The use of the term "particular" cannot be considered to be accidental, and its plain meaning should be given effect. *See United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). "Particular" is primarily defined in Merriam-Webster's Collegiate Dictionary, 11th ed. (2003), as "of, relating to, or being a single person or thing." Alternative definitions include "of, relating to, or concerned with details" and "distinctive among other examples or cases of the same general category." Certainly the term "particular person" is routinely considered to refer to a specific identifiable person.

One commentator has observed that the "particular person or persons" language of the PLRA appears to restrict the "institutional litigation" which characterized pre-PLRA prisoner litigation. As set out in S. Baradaran-Robison, *Kaleidoscopic Consent Decrees: School Desegregation and Prison Reform Consent Decrees after the Prison Litigation Reform Act and Freeman-Dowell*, 2003 B.Y.U.L. Rev. 1333, n.110 (2003):

> However, under PLRA § 3626(a)(1)(A), prospective relief granted to prisoners only extends to "correct the

> violation of the Federal right of a particular plaintiff or plaintiffs." 18 U.S.C. § 3626(a)(1)(A) (2000) [emphasis in original removed]. *This new requirement seems to do away with the prior goal of institutional litigation, which was to "affect more than the rights of immediate litigants."*

[Emphasis added.] The author went on to note that the court in *Anderson v. Garner*, 22 F.Supp.2d 1379 (N.D. Ga. 1997), had rejected a defendant's argument that the PLRA "prohibits certification of prisoner class actions." The Tenth Circuit's decision also cites *Anderson*. As discussed below, however, *Anderson* is of no precedential value here.

While not controlling authority, *Anderson* is the only decision known to address the issue of the effect of the PLRA on prisoner class actions. *Anderson* involved prisoner claims that correctional officers used excessive force during shakedowns. In their response to the plaintiffs' motion for class certification, the defendants argued that the PLRA should be read to bar prisoner class actions. The court rejected the defendants' argument and held that the PLRA did not bar such actions. *Anderson*, 22 F.Supp.2d at 1383.

First, *Anderson* is a district court decision and has no precedential value. Second, the issue and argument here differs from that presented and made by the defendants in *Anderson*. Here, Petitioners ask the Court to examine the express language and intent of the PLRA and determine whether such language and intent permit district courts to consider identifiability in their class certification analysis and, further, whether such language and intent permit the district courts to consider the claims and relief requested. In *Anderson*, the defendants asked the court to broadly find that the PLRA barred prisoner class actions. Finally, *Anderson* is factually distinguishable. Unlike the injunctive relief requested in the present case, the injunctive relief requested in *Anderson* was direct and narrowly tailored to correct the

alleged violation of the federal right of the plaintiffs—use of excessive force during shakedowns. It is also of interest to note that, with the exception of the district court order and the panel decision here, in the seven years since its publication, *Anderson* has not been cited as precedent in any published opinion in any circuit.[3]

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[3] The Tenth Circuit also cites *Armstrong v. Davis*, 275 F.3d 849 (9th Cir. 2001); *Skinner v. Uphoff*, 209 F.R.D. 484 (D.Wyo. 2002); and *Jones'El v. Berge*, 172 F.Supp.2d 1128 (W.D. Wis. 2001), and suggests that these cases have permitted post-PLRA class actions. However, these cases are even less on point than *Anderson*.

In *Armstrong*, the Ninth Circuit affirmed the injunctive relief granted by the district court arising out of violations of the ADA and the Rehabilitation Act. However, in doing so, the court specifically held that the district court made the findings required by the PLRA and narrowly tailored the injunction to remedy only those violations of the ADA and the Rehabilitation Act established in the district court's findings. *Armstrong*, 275 F.3d at 872. Nowhere in the opinion does the court consider the PLRA's impact on class certification.

In *Skinner*, the Wyoming district court considered a petition for class action brought on behalf of current and future inmates of the state prison alleging that the policies of the prison exposed the inmates to assaults by other inmates. Nowhere in the opinion is there any consideration of the PLRA's effect on such petition for class certification. Similarly, in *Jones'El*, a Wisconsin district court, without any argument or consideration of the PLRA, certified a class action regarding a number of confinement conditions issues.

The Tenth Circuit decision also cited *Williams v. Edwards*, 87 F.3d 126 (5th Cir. 1996), for the proposition that "the PLRA does not alter the class certification analysis." (App. 11a.) However, a review of *Williams* demonstrates that the case had nothing to do with issues of class certification analysis. *Williams* arose from several inmates' challenge to the constitutionality of their housing conditions. The relevant issue on appeal arose from the district court entering a reinstatement order reasserting jurisdiction over the institutions and vacating prior modification orders which had partially terminated the court's supervision. The PLRA became law three days before the Fifth Circuit heard oral arguments. As a result, the Fifth Circuit requested supplemental briefing on the applicability of the

The district court, here, was aware that the proposed prisoner class was hopelessly vague and incapable of reasonable identification. The district court was further aware that it could not reasonably reconcile the provisions of the PLRA with such an ill-identified class. It is axiomatic that a court need not adopt an interpretation of a statute which would lead to absurd or futile results at variance with the policy or legislation as a whole. *See E.E.O.C. v. Commercial Office Products Co.*, 486 U.S. 107, 120 (1988). The express language of the PLRA restricts prisoner actions to those that redress a violation of federal rights of "a particular plaintiff or plaintiffs," and such language cannot be rationally harmonized with the panel decision rejecting identifiability as a class certification factor.

As set out above, the Tenth Circuit held that the district court could not, in its class certification analysis, consider the nature of the claims and relief requested. While Petitioners agree that a district court may not, in its class certification analysis, consider whether plaintiffs will ultimately prevail on the merits, the intent of the PLRA is to permit district courts to consider the nature of the claims and relief sought to determine whether the case may be properly maintained within the constraints of the PLRA. Indeed, if it is clear from the relief requested, as it was to the district court in this case, that plaintiffs seek to engage in old-style, system-wide, court-sponsored jail reform, the court should be permitted to reject a class certification request on that basis.

Even without consideration of the PLRA, a court may make a preliminary inquiry into the merits of the case where the question of suitability of the case for class treatment

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PLRA to the appeal. The Fifth Circuit ultimately held that the provisions of the PLRA had not been triggered because the district court had yet to order any prospective relief. *Williams*, 87 F.3d at 133. The *Williams* decision did not address class certification analysis and certainly did not consider the issues raised here.

overlaps with such questions of the merits. *See Szabo v. Bridgeport Machines, Inc.*, 249 F.3d.672, 676 (7th Cir. 2001). Such an inquiry is not one which focuses on the substantive strength or weakness of plaintiffs' claims but, rather, is one which permits the court to determine whether the case is suitable for class treatment. "Whether a case should be allowed to proceed as a class action involves intensely practical considerations, most of which are purely factual or fact-intensive." *Reed v. Bowen*, 849 F.2d 1307, 1309 (10th Cir. 1988). Here, the district court's consideration of the federal allegations and relief requested, recognizing that it was "apparent from the plaintiffs' papers that this civil action is an effort to reform jail practices rather than to redress past constitutional torts and prevent their reoccurrence" (App. 26a), was not a determination on the ultimate merits of plaintiffs' case, but bore directly on considerations of the suitability of the case for class treatment. The PLRA further strengthens the otherwise already available discretion of the district court to consider the factual allegations as well as the remedy requested in its class certification analysis.

Congress clearly intended to restrict judicially-imposed, system-wide institutional reform which characterized pre-PLRA prison suits. A primary legislative intent was to curb the massive amounts of judicial and state resources which were being directed to the litigation of these suits. *See* 141 Cong. Rec. S14408-01, S14414 (daily ed. Sept. 27, 1995) (statement of Senator Dole) (noting that prisoner suits increased from 6,600 in 1975 to more than 39,000 in 1994); 141 Cong. Rec. S7498-01, S7526 (daily ed. May 25, 1995) (statement of Senator Kyl) (stating that in 1994, prisoners brought more than one-fourth of all civil suits filed in the United States district courts). The Tenth Circuit decision fails to consider the legislative intent by requiring that district courts turn a blind eye to the PLRA in its class certification analysis. Essentially, then, the Tenth Circuit would have district courts certify class action efforts at system-wide

institutional reform and condone expansive prison conditions litigation, knowing that, in the end, the relief requested would be unavailable.[4] The Tenth Circuit was too narrow in looking only to whether the PLRA expressly addressed class certification. Congress' intent, as evidenced by the legislative history, is contrary to the Tenth Circuit's decision. *See Watt v. Alaska*, 451 U.S. 259 (1981) (providing for review of legislative history in situation where later-enacted statute failed to mention prior related statute). It is the goal of statutory construction to give effect to the intent of Congress. *See Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1108 (1983) (O'Connor, J., concurring) ("[o]ur polestar, however, must be the intent of Congress, and the guiding lights are the language, structure, and legislative history of [the statute]").

Plaintiffs argued, and the Tenth Circuit agreed in its decision, that the district court's review of the remedies requested was an inappropriate 'sneak peek.' (App. 14a.) The district court, however, perceived the PLRA's limitations on available remedies as a restriction on the court's jurisdiction. Certainly, Article III of the U.S. Constitution requires a party seeking to invoke the jurisdiction of the federal court to

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[4] Although not a prison conditions case, the Tenth Circuit opinion here appears to be at odds with its opinion in *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280 (10th Cir. 1999). In that case, the plaintiffs sought remedies for alleged "systemic failures in [New Mexico's] child welfare delivery system" in which the plaintiffs alleged that the class members were denied "access to legally-mandated services." 186 F.3d at 1289. The case was one which required particularized analysis on many issues. The court upheld the denial of class certification, noting:

> Here, rather than adequately advancing a discrete question of law, plaintiffs merely attempt to broadly conflate a variety of claims to establish commonality via an allegation of "systemic failures." We refuse to hold, as a matter of law, that *any* allegation of a systemic violation of various laws automatically meets Rule 23(a)(2).

186 F.3d at 1289.

present an "actual case or controversy." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). Indeed, the likelihood that a claimed injury will be redressed by the relief sought is one of three general considerations of Article III standing to pursue prospective equitable relief. *See Sierakowski v. Ryan*, 223 F.3d 440, 443 (7th Cir. 2000). Even if the PLRA is not read to establish the jurisdictional bar observed by the district court, it would seem indisputable that, minimally, the PLRA establishes prudential considerations that are appropriately factored into a district court's class certification analysis in proposed prisoner class actions.

District courts have always been vested with considerable discretion in their determination as to whether to grant or deny class certification. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 630 (1997). This is, in part, a recognition that prudential considerations are often considered in such discretionary determinations. *See Reed v. Bowen*, 849 F.2d 1307, 1309 (10th Cir. 1988) ("[w]hether a case should be allowed to proceed as a class action involves intensely practical considerations, most of which are purely factual or fact-intensive"). *See also United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 402-03 (1980). The Tenth Circuit's decision would, for prisoner litigation, essentially strip district courts of this practical and prudential discretion.

CONCLUSION

In holding that the PLRA does not change the landscape of Fed.R.Civ.P. 23(b)(2) class certification analysis, the Tenth Circuit has undermined the language of the PLRA and the intent of Congress. The PLRA provides that prisoner claims must be brought to vindicate a violation of a federal right of a particular plaintiff or plaintiffs. As such, the PLRA envisions that a proper consideration in a prisoner class certification analysis is the identifiability of plaintiffs within the proposed class. Further, in holding that the PLRA does not permit consideration of the nature of the claims and relief requested,

the Tenth Circuit has failed to give voice to the intent of Congress to restrict the type of system-wide institutional reform of jails and prisons which characterized pre-PLRA suits. The PLRA should be read to further strengthen the already available prudential discretion of the courts to consider the claims and relief requested in their prisoner class certification analysis. To hold otherwise invites actions, such as here, where plaintiffs' objectives are to impose system-wide jail reform rather than to correct the violation of a federal right of a particular plaintiff or plaintiffs.

For these reasons, the petition for a writ of certiorari should be granted and the opinion of the Tenth Circuit reversed.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Filed December 8, 2004]

No. 03-1397

MARK SHOOK; DENNIS JONES, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellants,

v.

SHIRLEN MOSBY; JAMES VAUGHAN,
Plaintiffs-Intervenors-Appellants,

v.

EL PASO COUNTY, BOARD OF COUNTY COMMISSIONERS OF EL PASO COUNTY; JOHN WESLEY ANDERSON, in his official capacity as Sheriff of El Paso County,
Defendants-Appellees.

ORDER

Before TACHA, *Chief Circuit Judge*, BARRETT and TYMKOVICH, *Circuit Judges*.

Appellees' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ [Illegible]
Deputy Clerk

APPENDIX B

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed Oct. 18, 2004]

No. 03-1397

MARK SHOOK; and DENNIS JONES, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellants,

SHIRLEN MOSBY; and JAMES VAUGHAN,
Plaintiffs-Intervenors-Appellants,

v.

EL PASO COUNTY, BOARD OF COUNTY COMMISSIONERS OF EL PASO COUNTY, and JOHN WESLEY ANDERSON, in his capacity as Sheriff of El Paso County,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE COLORADO
(D.C. NO. 02-M-651-MJW)

Before TACHA, BARRETT, and TYMKOVICH, *Circuit Judges*.

TYMKOVICH, *Circuit Judge*.

This case involves the unsuccessful effort by four former state prisoners to certify a class action challenging their lack of access to mental health care while incarcerated in the El Paso County, Colorado Jail. The district court denied them class certification and dismissed the suit based on its con-

clusion that under the Prisoner Litigation Reform Act the relief the plaintiffs sought was "beyond the competence and the jurisdiction of [the] court." *Shook v. Bd. of County Comm'rs of County of El Paso*, 216 F.R.D. 644, 648 (D. Colo. 2003).

The plaintiffs now appeal, arguing that the district court applied the wrong standard in denying class certification. We take jurisdiction under 28 U.S.C. § 1291 (2000) and, agreeing with the prisoners, reverse and remand for further proceedings.

I. BACKGROUND

A. The Jail

The El Paso County Jail is located in Colorado Springs, Colorado. The Jail houses both men and women, including recent arrestees, persons awaiting trial, and persons convicted and sentenced to terms of two years or less under state law. Each of the four named plaintiffs[1] in this suit was incarcerated in the Jail sometime between 2001 and 2002, either as a pretrial detainee or as an inmate.

B. The Class Action Complaint

On April 2, 2002, the prisoners filed a class action complaint under 42 U.S.C. § 1983 seeking injunctive and declaratory relief against the El Paso County Board of County Commissioners and the Sheriff of El Paso County in his official capacity. They sought to certify a class of "all persons with serious mental health needs who are now, or in the future will be, confined in the El Paso County Jail." App. at 13.

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[1] Unless otherwise indicated, throughout this opinion the term "plaintiffs" or "prisoners" refers both to plaintiffs Mark Shook and Dennis Jones and plaintiff-intervenors Shirlen Mosby and James Vaughan.

In their complaint, the named plaintiffs allege that Jail officials have violated the prisoners' constitutional rights by acting with deliberate indifference to their mental health needs contrary to the Eighth Amendment's prohibition against cruel and unusual punishment and the Fourteenth Amendment's prohibition against punishment of pretrial detainees. In particular, the plaintiffs allege that Jail personnel subjected them to (1) inadequate housing and overcrowding; (2) inadequate inpatient care; (3) inadequate mental health facilities for women inmates; (4) improper treatment through the use of special detention cells, restraints, and pepper spray; (5) inadequate supervision to prevent self-harm or suicide; (6) inadequate methods of distributing medication; and (7) inadequate mental health staffing. They also assert that El Paso's management of the Jail has created a substantial risk of future harm to class members.

The individual plaintiffs each assert slightly different factual allegations to support their claims of deliberate indifference. The first, Mark Shook, maintains that he has been receiving psychiatric care since childhood for his conditions of Asperberger's Syndrome (a form of autism) and bipolar disorder. Before he came to the Jail in fall 2001, he regularly took anti-psychotic drugs prescribed by his psychiatrist to control his symptoms. He alleges that after his arrival at the Jail, he had no access to doctors or medications for three weeks. When Jail officials finally allowed him to see a doctor, the doctor refused to prescribe his regular medications because they were not on the Jail's list of approved medications.

Plaintiff Dennis Jones asserts that he is bipolar, suffers from depression and anxiety, and has considered suicide. Prior to entering the Jail in September 2001 he claims a prescription of a combination of various drugs successfully controlled his symptoms. Jones claims that Jail officials denied him access to any medications for nearly a month after

his incarceration, and when he finally obtained a prescription, he received only an insufficient dose of one of the drugs he needed. In addition, he alleges that Jail staff who monitored the levels of his medication through blood sample testing took the samples too soon or too long after he received his medication for the tests to be accurate.

Plaintiff-intervenor Shirlen Mosby alleges that she is bipolar and has experienced numerous attacks of anxiety, depression, feelings of hopelessness, and suicidal thoughts. She asserts that after her incarceration began in April 2002, Jail officials improperly placed her in special detention cells and Jail staff belittled her condition. She also maintains that because of inadequate supervision she was able to attempt suicide three times while housed in the Jail.

Finally, plaintiff-intervenor James Vaughan asserts that he is bipolar and has nearly continuous depression and anxiety. He claims that he had inadequate access to psychiatrists during his incarceration as a pretrial detainee beginning in May 2002. He also claims that he was deprived of medication for several days after he arrived at the Jail and never received the blood tests necessary to monitor the medication he finally did receive.

The plaintiffs allege that their lack of access to adequate mental health care is life-threatening. For example, they claim that the Jail officials' deliberate indifference to prisoners' mental health needs has led to the deaths of at least four prisoners and resulted in injuries to others.

C. The Procedural History

El Paso moved to dismiss the class action complaint, arguing that each class member was required to fully exhaust his or her administrative remedies under the Prisoner Litigation Reform Act. 42 U.S.C. § 1997e(a) (2000) ("PLRA"). El Paso asserted that because only the class representatives had exhausted their remedies, the class could not be certified.

On its own motion, the district court requested supplemental briefing from both parties regarding the impact of the PLRA's remedial provisions on the issue of certifying a class seeking prospective relief. App. at 62 (citing 18 U.S.C. § 3626 (2000)).

After oral argument, the district court issued an order denying both the defendants' motion for dismissal and the plaintiffs' motion for class certification. Although the district court noted that the plaintiffs had each alleged facts sufficient to show that El Paso was deliberately indifferent to their mental health needs in violation of the Eighth Amendment, *see Shook*, 216 F.R.D. at 646 (citing *Estelle v. Gamble*, 429 U.S. 97 (1976)), the court ultimately concluded that the PLRA precluded class certification because the "breadth [of relief sought made] the proposed class action not manageable with [the] court's limited jurisdiction." *Id.* at 648.

In light of its ruling, the court granted the plaintiffs thirty days in which to file an amended complaint for individual relief. *Id.* at 649. By this time, however, none of the plaintiffs remained in the Jail and therefore they no longer had standing to seek individual relief. The district court accordingly dismissed the action. App. at 140-41.

The prisoners now appeal the district court's denial of class certification.

II. ANALYSIS

A. Standard of Review

Whether the district court applied the correct legal standard in its decision to grant or deny class certification is reviewed de novo. *Thiessen v. General Electric Capital Corp.*, 267 F.3d 1095, 1105 (10th Cir. 2001). "When the district court has applied the proper standard in deciding whether to certify a class, we may reverse that decision only for abuse of discretion." *Adamson v. Bowen*, 855 F.2d 668, 675 (10th Cir.

1988). However, "that discretion must be exercised within the framework of rule 23." *Stirman v. Exxon Corp.*, 280 F.3d 554, 561 (5th Cir. 2002). An abuse of discretion occurs where the district court misapplies the Rule 23 factors in deciding whether class certification is appropriate. *See id.; see also J.B. v. Valdez*, 186 F.3d 1280, 1287 (10th Cir. 1999) ("There is no abuse of discretion when the trial court applies the correct criteria [under Rule 23] to the facts of the case.") (citations omitted). We review de novo whether the district court correctly determined that the PLRA applied to the Rule 23 class certification analysis. *See Dang v. UNUM Life Ins. Co. of Am.*, 175 F.3d 1186, 1189 (10th Cir. 1999) ("We review the district court's decisions on questions of law . . . de novo.").

Although the party seeking to certify a class bears the burden of proving that all the requirements of Rule 23 are met, *see Reed v. Bowen*, 849 F.2d 1307, 1309 (10th Cir. 1988), the district court must engage in its own "rigorous analysis" of whether "the prerequisites of Rule 23(a) have been satisfied." *Gen. Tel. Co. of the S. W. v. Falcon*, 457 U.S. 147, 161 (1982). In doing so, the court must accept the substantive allegations of the complaint as true, *J.B.*, 186 F.3d at 1290 n.7; *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974), although it "need not blindly rely on conclusory allegations which parrot Rule 23" and "may consider the legal and factual issues presented by plaintiff's complaints." *J.B.*, 186 F.3d at 1290, n.7 (quoting 2 Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 7.26 (3d ed. 1992)).

B. The District Court's Order

We now turn to the district court's denial of class certification. Rule 23(a) requires an analysis of four elements which are preconditions to class certification: numerosity, commonality, typicality, and adequacy of the named parties to represent the class. Fed. R. Civ. P. 23(a). The court must

then look to the category of class action under Rule 23(b) for additional prerequisites involving certification of a class.

In this case, the district court appropriately began its analysis by referring to Rule 23(a)'s four prerequisites to class certification. Instead of applying Rule 23(a)'s framework to the facts alleged, however, it moved to other "considerations controlling the motion for class certification," including

> whether the named plaintiffs and interveners have standing to assert the claims made on behalf of the putative class, whether the members of the class can be identified, whether the class allegations are broader than the constitutional claim, whether the putative class is manageable and, whether the court has the authority to order the prospective remedy requested.

Shook, 216 F.R.D. at 647. The court's evaluation of these factors turned primarily on whether the prisoners could in fact show an Eighth Amendment violation and whether their allegations, if proven; would entitle them to the relief they requested. The court did not address Rule 23(b)(2).

In evaluating whether the prisoners could allege an Eighth Amendment violation, the court reached two conclusions. It first determined that because the Jail's population was "inherently fluid," the plaintiffs could only prove that the defendants were deliberately indifferent to the class's needs *if* the Jail used "an intake diagnostic procedure to determine persons having serious mental health needs." *Id.* at 648. However, it concluded that intake screening was not constitutionally required and therefore could not form the basis for a constitutional violation.

The court then determined that the prisoners' complaint was really an attempt "to reform jail practices rather than to redress past constitutional torts and prevent their reoccurrence." *Id.* at 647. The problem here, according to the court,

was that the PLRA limited the federal court's ability to address such a complaint. Since it concluded that under the PLRA it could neither "prescribe jail practices for humane treatment of prisoners" nor interfere with the executive and legislative branches' ability to structure prisons as they saw fit, the relief the plaintiffs sought was "beyond the competence and the jurisdiction of [the] court." *Id.* at 648.[2]

C. The Effect of the PLRA on Rule 23

We first consider whether, as the district court concluded, the PLRA has changed the requirements for class certification under Rule 23. El Paso argues that the PLRA has changed the prison condition litigation landscape in a fundamental way that must be considered in the Rule 23 class action certification analysis. The prisoners respond that the PLRA affects only the remedies they can ultimately obtain and does not alter Rule 23.

The district court's analysis of the PLRA centered around the following provision that limits prospective relief in cases involving prison conditions:

> Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or ap-

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[2] The court's concern with the merits of the complaint is evidenced by the hearing on the class action motions: *see, e.g.*, App. at 88 (explaining that for the plaintiffs to have exhausted their claims, their grievance would have to "rise to the level of a violation of the Eighth Amendment" and then concluding that "[s]ome of these things don't rise to that level"), 98 (asking whether the remedies requested by the plaintiffs are required by the Eighth Amendment), 100-01 (requesting supplemental briefing on why the requested relief is required by the Eighth Amendment and then stating, "[A]s far as I interpret your complaint, you've gone way beyond anything that any court has ever said is required under the Eighth Amendment").

> prove any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

18 U.S.C. § 3626(a)(1)(A).

While the court determined that this provision did not entirely prohibit class action certification, it held that it did constitute a significant limitation on its jurisdiction to entertain class action suits by prisoners. *Shook*, 216 F.R.D. at 646. The question for us, then, is whether courts may consider the relief the prisoners seek in determining whether to certify a class under the PLRA. Our review of the PLRA leads us to conclude that it does not limit class certification decisions in this way.

In interpreting the PLRA, "[w]e begin, as we do any instance of statutory construction, with the language of the statute." *In re Geneva Steel Co.*, 281 F.3d 1173, 1178 (10th Cir. 2002) (citing *Yankee Atomic Elec. Co. v. N.M. & Ariz. Land Co.*, 632 F.2d 855, 857 (10th Cir. 1980)); *see also Guidry v. Sheet Metal Workers Int'l Ass 'n, Local No. 9*, 10 F.3d 700, 708 (10th Cir. 1993) ("The objective of reading the statute is to determine the intent of Congress. The text of the statute itself is the best evidence of that intent.") (citations omitted). The text of the PLRA says nothing about the certification of class actions. Based on the statute's absence of direction in that area, we presume that Congress intended to leave Rule 23 intact. *See Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 133 n.4 (2002) (concluding that Congress is "presumed to be aware" of a statute's interpretation when it amends another part of the same statute without addressing the part at issue); *Edelman v. Lynchburg Coll.*,

535 U.S.106, 117-18 (2002) (explaining that Congress's amendment of "the law without repudiating the regulation" suggested consent to ongoing use of the regulation). This presumption is buttressed by the fact that the PLRA includes provisions relating to the administration of class action suits, suggesting that Congress recognized that class actions would continue to remain available to challenge conditions of confinement.[3] *Cf. Founding Church of Scientology of Wash., D. C., Inc. v. Director, Fed. Bureau of Investigation*, 459 F. Supp. 748, 755 (D.D.C. 1978) (noting that because Congress did not expressly waive the exhaustion of administrative remedies requirement when it amended the Federal Tort Claims Act, that requirement remained applicable to class actions under Rule 23).

Our conclusion that the PLRA does not alter the class certification analysis under Rule 23 has been reached by other courts. The Fifth Circuit, for example, held that § 3626(a)(l) is not implicated until the court undertakes to fashion prospective relief. *Williams v. Edwards*, 87 F.3d 126, 133 (5th Cir. 1996) ("The district court has fashioned no prospective relief and the provisions of [§ 3626(a)(1)] have yet to be triggered."). The court did, however, explain that if, after examining the plaintiffs' claims, the district court found a violation of a federal right, "then any remedy it might fashion must conform to the standards set forth in the Act." *Id.* Thus, because the fashioning of prospective relief does not occur at the class certification stage, it logically follows that § 3626(a)(1) does not bear on a court's class certification analysis.

In addition, courts have continued to allow prison conditions cases to be certified as long as the elements of Rule 23

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[3] For instance, the PLRA contains provisions governing prisoner release orders, 18 U.S.C. § 3626(a)(3); consent decrees, *id.* subsection (c); and the use of special masters, *id.* subsection (f).

have been met, even cases broadly challenging conditions of confinement. For instance, in *Anderson v. Garner*, 22 F. Supp. 2d 1379 (N.D. Ga. 1997), when the defendants argued that under § 3626(a)(l) courts "should diligently refrain from certifying classes . . . which would require the federal courts to maintain security and control of the state prison system," the court emphasized that "[s]ection 3626(a)(1) addresses only the *type* of relief courts may use to redress constitutional violations, and says nothing about the nature of the proceedings underlying the remedy ordered by the court." *Id.* at 1383 (citations omitted); *see also Armstrong v. Davis*, 275 F.3d 849 (9th Cir. 2001) (reviewing the propriety of class certification under Rule 23, then separately reviewing whether district court's injunctive relief was narrowly tailored under § 3626(a)(1)); *Skinner v. Uphoff*, 209 F.R.D. 484, 489 (D. Wyo. 2002) (certifying class action challenging prison conditions because plaintiffs satisfied elements of Rule 23); *Jones 'El v. Berge*, No. 00-C-421-C, 2001 WL 3437961 (W.D. Wis. Aug. 14, 2001) (allowing amended prisoner class action complaint challenging prison conditions because plaintiffs satisfied elements of Rule 23).

Thus, we conclude that Congress did not intend the PLRA to alter class certification requirements under Rule 23 and that the district court erred in concluding otherwise.

D. Federal Rule of Civil Procedure 23

Having held that the PLRA does not add new elements to the class certification analysis, Rule 23 remains the appropriate analytical framework for class certification questions. We now turn to the issue of whether the district court properly applied Rule 23's certification requirements to the facts of this case.

"In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the

requirements of Rule 23 are met." *Anderson v. City of Albuquerque*, 690 F.2d 796, 799 (10th Cir. 1982) (quotation omitted); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974) ("[N]othing in either the language or history of Rule 23 . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."). Although "the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action," the court's responsibility is to "carefully apply the requirements of Rule 23(a)." *Gen. Tel. Co. of the S. W. v. Falcon*, 457 U.S. 147, 160 (1982) (citations and quotations omitted); *see also Anderson*, 690 F.2d at 799.

Thus, the court's first inquiry is whether the plaintiff can show the existence of the four threshold requirements of Rule 23(a). *Adamson v. Bowen*, 855 F.2d 668, 675 (10th Cir. 1988). Specifically, the court must decide if

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

If the court finds that the plaintiffs have met these threshold requirements, "it must then examine whether the action falls within one of three categories of suits set forth in Rule 23(b)." *Adamson*, 855 F.2d at 675. In this case, the plaintiffs sought to certify the class action under 23(b)(2), which provides that a class action is appropriate if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with

respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). Therefore, the court was required to consider whether "the remedies the class [sought] . . . applied] equally to all cases pending within the class." *Adamson*, 855 F.2d at 676. Factually different claims of individual class members "should not preclude certification under Rule 23(b)(2) of a claim seeking the application of a common policy." *Id.*

According to the prisoners, the problem with the court's order is that it does not square its concerns about the relief they seek with the requirements of Rule 23(a) and (b)(2). They argue that by conducting a review of whether the plaintiffs' requested relief was constitutionally required, the district court prematurely peeked at the merits of the case and improperly read two requirements of Rule 23(b)(3)—identifiability and manageability into the Rule 23(b)(2) analysis.

In defense of the court's methodology, El Paso argues that the decision to certify a class "involves intensely practical considerations" and that therefore the district court properly examined the additional considerations in its order denying class certification. *Reed v. Bowen*, 849 F.2d 1307, 1309 (10th Cir. 1988). Additionally, El Paso maintains that denial was proper under Rule 23 because the court's ruling is best read as concluding that (1) the complaint could not meet the commonality, typicality, and representational requirements of Rule 23(a) and (2) the plaintiffs' claims were too dissimilar to satisfy Rule 23(b)(2).

Specifically with respect to Rule 23, El Paso argues that the prisoners' individual claims are too varied to meet the commonality and typicality requirements because each prisoner's claim requires a particularized analysis on the merits. El Paso claims that these failings in commonality and typicality make the prisoners inadequate class representatives. Finally, El Paso argues that the dissimilarities among the

prisoners' claims i.e., their varied mental health problems and potential remedies for those problems make final injunctive relief inappropriate under Rule 23(b)(2).

On this record and at this stage in the litigation, we agree with the prisoners. The district court erred by not specifically addressing the traditional Rule 23 factors in denying class certification. *See J.B.*, 186 F.3d at 1287. Its order instead prematurely focused on whether the court could ultimately fashion a remedy that satisfied the strictures of § 3626(a)(1)(A).

Two additional considerations bear on the district court's application of Rule 23. The prisoners contend that by looking at the merits of their claim, the district court appears to have imported additional elements from Rule 23(b)(3) into the (b)(2) analysis: identifiability and manageability. While we agree with the prisoners in part, as explained below, we are not persuaded that manageability is never a proper inquiry under Rule 23(b)(2).

Regarding identifiability, the district court's order specifically states that "[t]he initial problem in this case is the identification of members of the class." *Shook*, 216 F.R.D. at 647-48. However, while the lack of identifiability is a factor that may defeat Rule 23(b)(3) class certification, such is not the case with respect to class certification under Rule 23(b)(2). *See Yaffe v. Powers*, 454 F.2d 1362, 1366 (1st Cir. 1972) ("[N]otice to the members of a (b)(2) class is not required and the actual membership of the class need not therefore be precisely delimited."). In fact, many courts have found Rule 23(b)(2) well suited for cases where the composition of a class is not readily ascertainable; for instance, in a case where the plaintiffs attempt to bring suit on behalf of a shifting prison population. *Id.* at 1366; *see also Adamson*, 855 F.2d at 676 (citing *Yaffe* with approval).

The district court also looked to a manageability requirement in applying Rule 23(b)(2): it found that the "breadth [of relief] [made] the proposed class action not manageable with [the] court's limited jurisdiction."[4] *Shook*, 216 F.R.D. at 648. The circuits do not speak with one voice on whether courts may look to manageability considerations in evaluating Rule 23(b)(2) class certification. The Fourth Circuit, for example, has held that "[i]ssues such as class action manageability are properly committed to the district court's discretion, because that court generally has a greater familiarity and expertise with the practical and primarily factual problems of administering a lawsuit than does a court of appeals." *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 757 (4th Cir. 1998) (citations and quotations omitted). The court also stated that, "in exercising the `broad discretion' to decide whether to allow a suit to proceed as a class action, some courts have ruled it is appropriate to take account of considerations not expressly addressed in Rule 23, including manageability in Rule 23(b)(2) cases." *Id.* at 758 (citing 7B C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1785 (2d ed. 1986)). The *Lowery* court went on to hold that since "efficiency is one of the primary purposes of class action procedure, . . . in appropriate circumstances a district court may exercise its discretion to deny certification if the resulting class action would be unmanageable or cumbersome." *Id.* at 759 n.5.[5]

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[4] Rule 23(b)(3) expressly directs courts to assess the "difficulties likely to be encountered in the management of a class action."

[5] Several other courts have endorsed this view. *See, e.g., Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1019 n.111 (D.C.C. 1986) (noting that "manageability problems that might block a class action under Rule 23(b)(3) may be entailed as well in the Rule 23(b)(2) format"); *Simer v. Rios*, 661 F.2d 655, 669 n.24 (stating that "it is not all clear that the problems in managing a class action are not relevant in certifying (b)(1) and (b)(2) class actions"); *Seidel v. Gen. Motors Acceptance Corp.*, 93 F.R.D. 122, 126 (W.D. Wash. 1981) (holding that manageability is and

According to the Fifth Circuit, however, in *Forbush v. J.C. Penney Co., Inc.*, 994 F.2d 1101, 1105 (5th Cir. 1993), "questions of manageability and judicial economy are . . . irrelevant to 23(b)(2) class actions." The Ninth Circuit reached a similar conclusion in *Elliott v. Weinberger*, 564 F.2d 1219, 1229 (9th Cir. 1977) ("[B]y its terms, Rule 23 makes manageability an issue important only in determining the propriety of certifying an action as a (b)(3), not a (b)(2), class action."), *aff'd in pertinent part sub nom. Califano v. Yamasaki*, 442 U.S. 682, 701 (1979).

We agree with the *Lowery* court. Elements of manageability and efficiency are not categorically precluded in determining whether to certify a 23(b)(2) class. While Rule (b)(2) classes for injunctive relief are usually easier to manage than damages class actions, courts also need to look to whether the class is amenable to uniform group remedies. *See Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 414 (5th Cir. 1998); 2 Newberg & Conte, *supra*, at § 4:17 (while injunctive relief "may often be awarded without requiring a specific or time-consuming inquiry into the varying circumstances and merits of each class member's individual case," courts may still look to whether the class is amenable to "uniform group remedies" in assessing management of the class). The vehicle of class action litigation must ultimately satisfy practical as well as purely legal considerations.

Notwithstanding our holding that manageability is not categorically barred in Rule 23(b)(2) class certification decisions, the district court's order has yet to apply fully the Rule 23 framework. On remand, it may well be that the factual and legal concerns leading the court to consider problems of identifying and managing the class support (a) a

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must be a concern when deciding class certification under Rule 23(b)(2)); *Duncan v. Tennessee*, 84 F.R.D. 21, 34 (M.D. Tenn. 1979) (noting that manageability is a proper inquiry under Rule 23(b)(2)).

finding under Rule 23(a) that the class lacked sufficient commonality, typicality or adequacy of representation, (b) a finding under Rule 23(b)(2) that El Paso did not operate the prison "on grounds generally applicable" to the class, or (c) a finding that, notwithstanding the PLRA, efficiency or manageability considerations undermine the court's ability to provide injunctive relief to the class framed in the complaint. In looking at these issues, there could also be (d) reasons why the "merits may become intertwined with proper consideration of other issues germane to whether the case should be certified as a class action" that guide the court's class certification decision. *Adamson*, 855 F.2d at 677 n.12. We cannot make that determination on this record, however, until the district court has applied all of the elements of Rule 23 to the facts alleged in the complaint.

III. CONCLUSION

We hold that the PLRA does not add new elements to the class certification analysis. Rather, because the district court erred by denying class certification relief without addressing Rule 23(a)'s threshold requirements or assessing Rule 23(b)(2)'s requirement of general applicability, we must reverse and remand for further consideration of the prisoners' complaint. We express no view on the district court's ultimate decision whether to certify in light of this opinion, nor do we opine on the ultimate merits of the substantive claims.[6]

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[6] We also do not address whether the district court could properly dispose of the case in another manner, for instance, by dismissing the case on its own motion under 42 U.S.C. § 1997e(c)(1) if it determines that the plaintiffs have failed to state a claim upon which relief can be granted or by "us[ing] an accelerated summary judgment procedure before class certification to test the plaintiff[s'] right to proceed to trial." *Adamson*, 855 F.2d at 677 n.12 (citing 7B C. White, A. Miller & M. Kane, *supra*, at § 1785.

TACHA, *Chief Circuit Judge*, concurring in part, dissenting in part.

I readily join the majority's opinion, with one exception. The majority holds that manageability is a proper criterion for courts to consider when certifying Fed. R. Civ. P. 23(b)(2) class actions. I respectfully dissent from this portion of the majority's opinion.

First, I find that circuit precedent bars this holding. We previously addressed whether a district court could rely upon a criterion listed under Rule 23(b)(3) as a reason for denying class certification under Rule 23(b)(2). *See Adamson v. Bowen*, 855 F.2d 668, 676 (10th Cir. 1988). There, plaintiff "sought relief under Rule 23(b)(2), which contains no requirement of 'predominance.' The district court placed upon the class a burden that the rule does not authorize." *Id.* I find that *Adamson* governs this case, prohibiting the use of a criterion found in Rule 23(b)(3)—such as manageability—as grounds for denying a Rule 23(b)(2) class.

Second, even if circuit precedent did not govern this issue, I find that the standard rules of statutory construction lead to a result contrary to that reached by the majority. Rule 23(b)(3) explicitly has a manageability criterion. *See* Fed. R. Civ. P. 23(b)(3)(D). Rule 23(b)(2) does not. Standard rules of construction, then, lead to the conclusion that manageability is not a criterion for Rule 23(b)(2) classes. *See O'Gilvie v. United States*, 519 U.S. 79, 96 (1996) ("When the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.") (internal citation omitted).

The majority counters that Rule 23(b)'s language is merely permissive, allowing the district court to consider Rule 23(b)(3) criteria in a Rule 23(b)(2) class. *See* Fed. R. Civ. P. 23(b) ("An action *may* be maintained as a class action if the prerequisites [are met.]") (emphasis added). Such a reading,

however, simply ignores the entire structure of Rule 23(b). *See Almendarez-Torres v. United States*, 523 U.S. 224, 228-29 (1998) ("we look to the statute's language, structure, subject matter, context, and history—factors that typically help courts determine a statute's objectives and thereby illuminate its text."). The majority's reading collapses the differences between a Rule 23(b)(1), (b)(2) and (b)(3) class, allowing a district court to consider any criteria under any of the subsections for any type of class. Such a reading is not in line with the structure of Rule 23(b) and is thus contrary to standard statutory construction. *See United States v. Rodgers*, 461 U.S. 677, 706 (1983) ("The word 'may,' when used in a statute, usually implies some degree of discretion [but] [t]his common-sense principle of statutory construction . . . can be defeated by indications of legislative intent to the contrary or by obvious inferences from the structure and purpose of the statute") (footnote and citations omitted). Rule 23(b) clearly envisions the different subsections and their concomitant criteria applying distinctly to different types of class actions.

I find, therefore, the Fifth and Ninth Circuits' approach more persuasive. *See Forbush v. J.C. Penney Co., Inc.*, 994 F.2d 1101, 1105 (5th Cir. 1993) ("questions of manageability and judicial economy are . . . irrelevant to 23(b)(2) class actions."); *Elliott v. Weinberger*, 564 F.2d 1219, 1229 (9th Cir. 1977) (same), *aff'd in part sub nom. Califano v. Yamasaki*, 442 U.S. 682 (1979). As such, I respectfully dissent from the manageability section of the majority's opinion.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

[Filed July 29, 2003]

Civil Action No. 02-M-651

MARK SHOOK and DENNIS JONES, on behalf of themselves and all others similarly situated,
Plaintiffs and

JAMES VAUGHAN and SHIRLEN MOSBY,
Intervenor Plaintiffs,

v.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF EL PASO and TERRY MAKETA, in his official capacity as Sheriff of El Paso County,
Defendant.

ORDER DENYING CLASS CERTIFICATION AND DENYING MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

On April 2, 2002, the American Civil Liberties Union Foundation of Colorado and the National Prison Project of the ACLU Foundation, Inc. filed a class action complaint for injunctive and declaratory relief naming Mark Shook, James Robillard and Dennis Jones as class representatives and alleging that prisoners in the El Paso County Jail facilities with "serious mental health needs" have been and are subject to actions and omissions by jail personnel that result in systemic violations of rights protected by the Eighth and Fourteenth Amendments to the United States Constitution. James

Robillard moved to withdraw from the case on June 7, 2002. The court ordered his dismissal on December 3, 2002. The plaintiffs filed a motion to certify the class on April 2, 2002, seeking certification of the following plaintiff class:

> All persons with serious mental health needs who are now, or in the future will be, confined in the El Paso County Jail.

The defendants filed a response in opposition to the motion to certify the class on May 13, 2002, and on the same date filed a motion to dismiss or, in the alternative, for summary judgment. The defendants' motion seeks dismissal for failure to exhaust administrative remedies as required by that portion of the Prison Litigation Reform Act of 1995 ("PLRA") that is now codified in 42 U.S.C. § 1997e(a).

On July 26, 2002, Shirlen Mosby and James Vaughn moved to intervene as plaintiffs and joined in the motion to certify the class. The court entered an order for supplemental briefing on the applicability of the limitations on court ordered relief enacted in the PLRA and now codified in 18 U.S.C. § 3626. Those briefs were filed. Oral argument on all motions was heard on January 15, 2003.

The factual allegations concerning the experiences of the named plaintiffs and interveners are sufficient to support claims that they had been diagnosed as having serious mental health needs which were not met when they were in El Paso County jail facilities because the personnel in charge of the prisoners acted or failed to act with deliberate indifference to those serious mental health needs. The Supreme Court established the law in *Estelle v. Gamble*, 429 U.S. 97 (1976) that such deliberate indifference is a violation of the Eighth Amendment prohibiting cruel and unusual punishments, made applicable to state and local officials under the Fourteenth Amendment. They have made additional allegations of affirmative actions by jail personnel in the use of excessive force. Thus, these named litigants have individual claims that

are actionable under 42 U.S.C. § 1983 within the jurisdiction provided by 28 U.S.C. § 1343(a)(3).

Both legal and equitable relief are available under 42 U.S.C. § 1983 against individuals whose conduct is violative of these constitutional protections and from the governmental units if the violations result from established policies and practices. None of the plaintiffs has sought damages.

This court's ability to order prospective relief by mandatory and prohibitory injunctions has been limited by the PLRA in 18 U.S.C. § 3626. Specifically, § 3626(a)(1)(A) reads as follows:

> Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

This statutory restriction is a limitation on jurisdiction. It does not prohibit the procedural device of class certification under Fed.R.Civ.P. 23(b) to determine the existence and extent of violations of the protections of the Constitution. *Anderson v. Garner*, 22 F.Supp.2d 1379 (N.D.Ga. 1997). In that case, the court granted a motion for class certification for claims that state correctional officers used excessive force during "shakedowns" at state prisons, identifying the class as

> All inmates housed in Georgia Department of Corrections facilities who will be subjected to future shakedowns led by Defendants Garner and/or Thomas, their successors, and their agents and assigns.

The court then ordered additional briefing on the question of whether the named plaintiffs had standing to litigate the merits of the claim by showing that they would be subject to such conduct in the future. There are no published additional proceedings for that case. The court's docket sheets show settlement.

Class certification depends upon finding the prerequisites in Rule 23(a) of (1) numerosity, (2) commonality, (3) typicality and (4) adequacy of the representative parties to protect the interests of the class. Each of those requirements is in dispute in this case.

In determining motions for class certification, the court must accept the allegations of the complaints as true and refrain from anticipating a ruling on the merits of the claims. Accepting these factual allegations as constituting deliberate indifference to the serious mental health needs of the plaintiffs and intervenors, the considerations controlling the motion for class certification are whether the named plaintiffs and interveners have standing to assert the claims made on behalf of the putative class, whether the members of the class can be identified, whether the class allegations are broader than the constitutional claim, whether the putative class is manageable and, whether the court has the authority to order the prospective remedy requested.

The plaintiffs allege the following:

> The needs of mentally ill prisoners include diagnosis of their condition, timely provision of proper treatment and medication by competent staff, safe and appropriate housing, and protection from inhumane and punitive actions taken out of ignorance of or indifference to their mental state.

In responding to the defendants' motion to dismiss or for summary judgment based on the failure to exhaust administrative remedies, the plaintiffs observe that there is no

grievance procedure available to prisoners in the El Paso County Jail to address a systemic failure to provide adequate facilities, train staff and provide adequate care for prisoners' serious mental health needs. They attached a psychiatrist's affidavit giving his opinion that persons with bipolar disorder may require the full range of mental health services including medication, psychotherapy, crisis intervention, prevention of self-harm and suicide and sometimes they must be placed in restraints. He further opined that such persons require supervision by a staff trained to recognize the symptoms of mental illness and to distinguish those symptoms from willful misbehavior. He further stated that each person with bipolar disorder is unique and reacts differently to different medications. Finally, he expressed the belief that the majority of mentally ill prisoners could not negotiate the multi-step El Paso County Jail grievance system.

In responding to the defendants' opposition to class certification, the plaintiffs identified the following questions of fact said to be common:

- Whether there are a sufficient number of competent and adequately-trained mental health staff at the jail to deal with the serious mental health needs of prisoners;
- Whether the defendants have in place adequate procedures to ensure that the medical provider complies with its contract and delivers the medical and mental health services specified therein;
- Whether the jail can safely and humanely protect prisoners who become suicidal;
- Whether the defendants are able to ensure that all prisoners who require in-patient psychiatric care are able to receive it in a timely fashion;
- Whether there is a sufficient number of security staff adequately trained to respond appropriately to the needs of prisoners with serious mental health needs;

- Whether security staff rather than medical staff or mental health staff make the decision to place suicidal or mentally ill prisoners in restraints;
- Whether security staff respond with inappropriate use of force to behavior that is caused by prisoners' mental illness;
- Whether the jail has an inadequate system for ensuring that the proper medications are delivered in the proper doses at the appropriate time to the appropriate prisoners;
- Whether the jail has an inadequate system for monitoring the effects of psychotropic medications that are delivered to prisoners with serious mental health needs;
- Whether the jail has an inadequate system for assuring continuity of care for prisoners with serious mental health needs who are recent arrivals or who are being released.

Plaintiffs' counsel have also submitted an opinion from a professor in the medical school of Yale University about requirements for the humane treatment of persons with serious mental health needs.

It is apparent from the plaintiffs' papers that this civil action is an effort to reform jail practices rather than to redress past constitutional torts and prevent their reoccurrence. The initial problem in this case is the identification of members of the class. As the plaintiffs and intervenors have observed, more than one thousand persons are housed in the El Paso County Jail facilities at any one time. National statistics suggest that approximately 20% of the prison population in the United States are persons with mental health needs. Jail populations are inherently fluid and the time in custody varies greatly. The El Paso County Jail houses persons who have just been arrested and may be released on bail or dismissed charges or transferred to other institutions within hours of

their detention. The inmate population includes pre-trial detainees and prisoners sentenced to confinement for less than two years or are awaiting transfer to Colorado Department of Corrections facilities. The identification of members of the class in this case necessarily would require an intake diagnostic procedure to determine persons having serious mental health needs. To find deliberate indifference to serious mental health needs there must be an awareness by the custodial authority that a prisoner has such needs. The named plaintiffs and interveners had prescriptions for medications which, by their nature, indicate the existence of mental health problems. There is nothing in the Constitution that requires the Sheriff of El Paso County to hire a competent professional staff to screen all persons coming to the jail to determine their mental and emotional status.

The plaintiffs make much of the facts that there have been suicides by prisoners in the El Paso County Jail and there are now pending in this court cases seeking damages for such suicide. Liability in those cases will depend upon a factual showing that there was some basis for a belief that the inmate was at risk for reasons other than custodial confinement. This court is not aware of any case that imposes liability for suicide or any other injury to an inmate because the jailers did not provide a mental health evaluation by a competent professional to determine mental health needs in advance of incarceration.

The law of liability for deliberate indifference to mental health needs of prisoners is not different from that regarding a failure to provide care for physical problems. There is no constitutional requirement that every person taken into custody be given a full physical examination to determine the existence of any such medical problems. Many such medical needs are not identifiable by obvious signs and symptoms and may not be known to the person in custody. Whether an Eighth Amendment violation has occurred is a question for a

jury after a trial on historical evidence following appropriate instructions on the law. In determining that question, the jurors are the arbiters of the defendants' conduct and, in effect, make the law for the case in the same manner that the jury in a common law negligence case decide what a reasonable person would or would not do in the same or similar circumstances.

The objective of this proposed class action is to have this court prescribe jail practices for humane treatment of prisoners. That is beyond the competence and the jurisdiction of this court. The questions sought to be addressed and answered are policy determinations to be made by the political branches of local and state government. The evident purpose of the PLRA was to emphasize the functional difference between the judiciary and the agencies of representative government. The limitations on remedy established by the PLRA would preclude this court from replicating *Ramos v. Lamm*, 639 F.2d 559 (10th Cir.1980).

The plaintiffs' recitation of common fact questions quoted above illustrate the failure to demonstrate the feasibility of class relief in this case. The prevention of deliberate indifference to substantial mental health needs of prisoners does not equate with establishing "adequate" and "appropriate" measures determined by a court relying on expert witnesses.

The breadth of the relief sought in this case is far wider than those cases preventing the use of restraint boards or other specific types of excessive force. That breadth makes the proposed class action not manageable with this court's limited jurisdiction.

The defendants' motion to dismiss or for summary judgment based on a failure to exhaust administrative remedies is denied because there is no available administrative remedy which the plaintiffs and intervenors could have used for relief.

Upon the foregoing, it is

ORDERED that the plaintiffs' and intervenors' motion for class certification is denied. The defendants' motion to dismiss or for summary judgment is denied and the 'plaintiffs and intervenors have 30 days to file an amended complaint for individual remedies.

DATED: July 29, 2003.

BY THE COURT:

/s/ RICHARD P. MATSCH
Richard P. Matsch
Senior District Judge

Case Number: 02-M-651

I certify that I mailed a copy of the attached to the following:

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Dated: July 29, 2003

By: _____

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. __

MARK SHOOK, JAMES ROBILLARD and DENNIS JONES,
on behalf of themselves and all others similarly situated,
Plaintiffs,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE
COUNTY OF EL PASO and JOHN WESLEY ANDERSON,
in his official capacity as Sheriff of El Paso County,
Defendants.

CLASS ACTION COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Plaintiffs, who are prisoners in the El Paso County Jail ("Jail") with serious mental health needs, and who are subject to the actions and omissions of defendants that are described in this Complaint, allege as follows:

BACKGROUND

1. Pre-trial detainee Michael Lewis died while strapped face-down to a restraint board in the Jail on May 7, 1998, his second time on the board for that day. The restraint was imposed by sheriff deputies, not medical or mental health personnel. For at least five days, he had been hallucinating and psychotic, the probable result of the Jail medical provider's decision to change his medications, a decision made without consulting with the therapist who had prescribed his former medications. Two days after security staff noted his

decompensation, the Jail's counselor placed him on the waiting list to see the Jail's psychiatrist, who visited the Jail only one morning every other week. Mr. Lewis did not live long enough to see the psychiatrist; he died while struggling against his restraints.

2. Since that death in May 1998, eight additional prisoners have died in the Jail, four of them in 2001. In almost every case, the deceased prisoner was suicidal, seriously mentally ill, or displaying symptoms of psychosis from overdose or withdrawal from street drugs or alcohol.

3. Shortly after the latest death, a suicide in November 2001, the American Civil Liberties Union wrote to defendant El Paso County Board of County Commissioners ("Board") to ask it to investigate the alarming pattern of prisoner deaths and consider whether the Jail was staffed with a sufficient number of competent medical, mental health, and security personnel who were adequately trained to recognize and respond appropriately to the needs of the Jail's population.

4. The Board declined to investigate.

INTRODUCTION

5. This class action for injunctive and declaratory relief is brought pursuant to 42 U.S.C. § 1983 to preserve the rights of the plaintiffs and the plaintiff class under the Eighth and Fourteenth Amendments to the United States Constitution.

6. The named plaintiffs and the plaintiff class are all subject to the actions, omissions and deliberate indifference of the defendants described herein. The named plaintiffs and the plaintiff class suffer from serious mental health problems, and the deliberate indifference of the defendants to these problems exposes each of them to conditions that constitute cruel and unusual punishment in violation of the Eighth Amendment and deprivation of liberty in violation of the Fourteenth Amendment. As a result of the defendants' actions

and omissions, the named plaintiffs and the plaintiff class face continued and further degradation of their mental health and daily exposure to a serious risk of injury or death.

7. This case is about the long-lasting and continuing failure and refusal of the Board and defendant Anderson to acknowledge or provide sufficient resources for the serious mental health needs of their prisoners during the time they are imprisoned in the Jail, and their failure to enter a contract with a medical services provider which (a) adequately provides for the prisoners' serious mental health needs, and (b) is rigorously enforced by defendants. The needs of mentally ill prisoners include diagnosis of their condition, timely provision of proper treatment and medication by competent staff, safe and appropriate housing, and protection from inhumane and punitive actions taken out of ignorance of or indifference to their mental state.

JURISDICTION AND VENUE

8. This Court has subject matter jurisdiction of this action pursuant to 28 U.S.C. § 1331 because this action arises under the Constitution and laws of the United States, and pursuant to 28 U.S.C. § 1343(a)(3) because this action seeks to redress the deprivation, under color of state law, of plaintiffs' constitutional rights. Venue is proper under 28 U.S.C. § 1391(b) because all defendants reside in this district, and because the events and omissions giving rise to plaintiffs' claims occurred in this district.

THE PARTIES

9. Plaintiff Mark Shook has been continuously confined in the Jail since the fall of 2001 and is mentally ill. See also paragraph 58.

10. Plaintiff James Robillard has been continuously confined in the Jail since the summer of 2000 and is mentally ill. See also paragraphs 59-62.

11. Plaintiff Dennis Jones has been continuously confined in the Jail since September, 2001 and is mentally ill. See also paragraph 63.

12. Defendant Board is a statutory governmental entity within the state of Colorado. It is a "person" within the meaning of 42 U.S.C. § 1983. The Board is responsible for the operation of the Jail and the El Paso County Sheriffs Department, and determines, through the annual award of contracts, the amount and nature of the mental health services provided to the prisoners in the Jail.

13. Defendant John Wesley Anderson ("Anderson") is the Sheriff of El Paso County, and pursuant to C.R.S. 30-10-511 has charge and custody of the Jail. He has final policy making authority for all matters relating to management of the Jail, including the provision for the mental health needs of the prisoners. He is sued in his official capacity.

14. With regard to all actions and omissions alleged herein, the defendants have acted and continue to act under color of state law.

FACTS RELATING TO THE CLASS AND THE CLASS ACTION

15. Plaintiffs bring this action pursuant to Fed. R. Civ. P. 23(a) and 23(b)(2) on behalf of themselves and all individuals who are members of a class defined as "all persons with serious mental health needs who are now, or in the future will be, confined in the El Paso County Jail."

16. The members of the class are so numerous, and the class so fluid, that joinder of all members is impracticable. The total population of the Jail exceeds 1,000, with approximately 20% having serious mental health needs. New prisoners and class members enter the Jail, and others are transferred or released, every day.

17. There are numerous questions of law and fact common to the class, including the scope and interpretation of the Eighth and Fourteenth Amendments in the Jail setting; the lawfulness of the policies, practices and omissions of the defendants in the provision of mental health services; and the effect of the defendants' deliberate indifference. All class members are equally subject to the conditions of confinement and the systemic deficiencies described in this Complaint, including the lack of sufficient staff with adequate training; lack of inpatient care; lack of adequate housing; lack of adequate protection from self harm and suicide; lack of an adequate system for medication; and the use of restraints and excessive force. The named plaintiffs have each been affected by these constitutionally deficient conditions of confinement and face a substantial risk of being adversely affected by them in the future. The claims of the class representatives are typical of those of the class and the class representatives will fairly and adequately protect the interests of the class. The attorneys representing plaintiffs are experienced in handling class action cases involving claims that jail and prison conditions violate prisoners' constitutional rights.

18. The defendants have, individually and collectively, acted and refused to act on grounds generally applicable to the class, and final injunctive and declaratory relief with respect to the class as a whole is appropriate.

STATEMENT OF FACTS COMMON TO ALL PLAINTIFFS AND THE PLAINTIFF CLASS

The El Paso County Jail Facilities

19. The Jail houses recent arrestees, persons awaiting trial, and persons convicted and sentenced to terms of two years or less. The Jail houses both male and female prisoners and houses both adults and juveniles who have been charged as adults. The Jail comprises two buildings, both located in Colorado Springs: the Criminal Justice Center ("CJC"), and the Metro Detention Center ("Metro").

20. The Jail's prisoner population regularly exceeds 1,000, and has been as high as 1,139. Both CJC and Metro are badly overcrowded; CJC was designed to house 588 prisoners and Metro was designed for 260 prisoners. A 1998 report by the American Correctional Association ("ACA") described CJC as "extremely overcrowded." On July 30, 2001, the ACA again notified defendant Anderson that the Jail is in violation of ACA capacity-standards. Although CJC was originally designed to house prisoners in cells arranged around a dayroom area, as a result of overcrowding, many prisoners are forced to sleep in bunk beds set up in the dayroom area. Other prisoners are forced to sleep in "sled beds," which are coffin-like plastic forms placed directly on the floor.

21. Facilities for the mentally ill are virtually nonexistent. The "mental health unit" in CJC is merely a cellblock, identical to others, that has been given this designation. Like the other cellblocks in CJC, the mental health cellblock is seriously overcrowded, with mentally ill prisoners sleeping on sled beds on the floor. The dangerous physical structure and poor management of the mental health cellblock pose serious risks to the prisoners of self-harm and suicide. At Metro, there are no separate facilities whatever for the mentally ill.

22. There are no separate facilities anywhere in the Jail for mentally ill women. All female prisoners are confined together regardless of their mental health needs. This practice heightens the risk of victimization and aggravates the suffering of mentally ill women.

23. In connection with litigation over the death of Michael Lewis, the medical director of the Jail stated under oath that between ten and twenty percent of the Jail's prisoners are prescribed psychotropic medications. While she was employed as the Jail's "mental health professional," Ruby pink stated under oath that she sees 200 to 300 prisoners per month, and that she believes 25% of these prisoners are

"acutely psychotic." At any given time, approximately 20% of the prisoners in the Jail have serious mental health needs.

24. Prisoners exhibiting signs of mental illness are frequently placed in "special detention calls." These tiny cells have no windows, no bed, no toilet, and no sink. Although Jail policies and corrections standards require deputies to check on the prisoner's welfare every 15 minutes, mentally ill prisoners are sometimes left in these cells unobserved by staff. In 1998, an ACA report "highly recommended that these rooms not be used as they do not meet accreditation standards." Nevertheless, defendants continue to use these cells to confine mentally ill prisoners. There is no therapeutic value in such confinement. Indeed, confinement of mentally disturbed prisoners in such conditions can exacerbate the seriousness of their illness.

25. The oppressive conditions in the special detention cells, including the lack of toilet facilities, can and do cause prisoners to pound on the cell door in an effort to get deputies to let them use a restroom or attend to other needs. Deputies often respond aggressively as though the prisoner is causing a disturbance, prompting the prisoner to respond with anger and frustration in turn. The resulting cycle of agitation and anger often escalates into a confrontation that can result in prisoners being forcibly restrained with shackles in the "fetal position," or strapped into the restraint chair, and/or medicated with drugs to "calm" the prisoner.

The Provision of Health Services

26. Health care services at the Jail, including mental health services, were, until recently, provided by Correctional Medical Services, Inc. ("CMS") pursuant to a contract with the Board. Such services are now provided pursuant to a contract with Correctional Healthcare Management ("CHM").

27. The defendants have failed in the past to ensure that the medical contractor provides fully the services promised in

the contract. The former medical services provider, CMS, failed in numerous material respects to provide the mental health services called for in its contract. For example, it (1) failed to conduct full mental health evaluations within the 14 days specified in the contract; (2) failed to provide a staff of licensed or certified mental health professionals; (3) failed to furnish the contractually-required clinical supervision; (4) failed to fulfill the medication monitoring standards set forth in the contract; (5) failed to have mental health staff on call and available 24 hours a day; and (6) failed to provide the necessary care and treatment for prisoners who need in-patient psychiatric care.

28. Defendants have failed to establish procedures to ensure that the new medical services provider, now CHM, complies fully with its contract, and provides all the services set forth therein.

29. The annual amount spent by the defendant Board for all health care at the Jail is approximately $2.3 million. Of this, only a small fraction is for the provision of mental health services.

30. Mental health staffing, which has not kept pace with the explosive growth in the Jail's population and the increasing percentage of that population with serious mental health needs, is inadequate to meet the serious mental health needs of the Jail's prisoners. The Jail's mental health staff are concentrated at CJC. Long delays frequently occur in the provision of essential care to mentally ill prisoners. The current contract for health services with CHM provides for psychiatric services of only 2 hours per week, or approximately 36 seconds per mentally ill prisoner per week. It provides for a psychologist for only 16 hours a week, and much of this time is spent on administrative matters. There are no psychiatric nurses. The two additional mental health employees the defendants provide are inadequate in number, are unlicensed and lack sufficient background and training

to provide for the serious mental health needs of the Jail's prisoners.

31. Some prisoners suffer from such acute mental health needs that transfer to an inpatient psychiatric facility is required for their safety and well being. Staff at the Jail fails to timely transfer these prisoners to an inpatient psychiatric setting where they could receive the treatment their condition requires. In the course of litigation over the death of Michael Lewis, the administrator of Correctional Medical Services stated under oath that the El Paso County Jail is "full of individuals that belong in the state hospital." According to this testimony, the state hospital does not accept all patients who need inpatient psychiatric care; it accepts only those who fit the more restrictive criterion of posing a danger to themselves or others. Even when prisoners in the Jail meet this more restrictive standard, at least half the time there is no bed available in the state hospital. When inpatient psychiatric care is needed but is not available at the state hospital, it is essential that the defendants provide it at some other location, but they do not do so. Defendants do not even take the minimal step of requiring that a prisoner who needs hospitalization be placed in the Jail's infirmary.

32. Security staff play a crucial role in mental health care in a jail setting. Because of their close and frequent contact with prisoners, they must be trained to recognize and understand the difference between willfully defiant behavior that violates jail rules, and behavior that is the product of psychosis or mental illness. In the latter case, they must promptly call upon mental health staff for assistance and evaluation, but often they do not do so. They must also regularly monitor mentally ill prisoners and intervene to protect them from attempts at self-harm or suicide. In part because the Jail is chronically understaffed as well as overcrowded, the security staff at the Jail are not able to maintain adequate surveillance of mentally ill prisoners. Moreover, they are not sufficiently

trained to perform their mental health-related duties in a competent manner.

33. On numerous occasions, security staff rather than mental health staff make decisions that only trained mental health professionals are qualified to make. For example, security staff often decide that a prisoner is suicidal and act on that decision by confining the prisoner in a special detention cell, sometimes with restraints. Without consulting with the Jail's mental health personnel, security staff often decide that the prisoner is no longer suicidal and can be released from the special detention cell. Security staff, rather than medical staff or the Jail's mental health personnel, often make the decision to place suicidal or mentally ill prisoners in restraints, including full body restraints such as the restraint chair. Security staff often respond to symptoms of mental illness with inappropriate use of force, rather than by summoning mental health staff to make appropriate mental health interventions.

Restraints and Use of Force Against Prisoners With Mental Illness

34. The Jail's use-of-force policy permits officers to use pepper spray against prisoners "in the maintenance of order and discipline." Pepper spray is sprayed in the face, and causes excruciating pain, gagging, and temporary paralysis of the larynx. Its use in custodial settings has been associated with side effects including high blood pressure, nerve damage, chemical bums, and death. The Jail's policy and training materials do not caution officers that pepper spray often fails to achieve the desired effect when the prisoner's unruly behavior is the result of mental illness or overdose or withdrawal from drugs or alcohol. Nor do the Jail's policy or training materials provide that officers should limit use of pepper spray to a single one-second burst. As a result, mentally ill prisoners are likely to be subjected to repeated doses of pepper spray, with the accompanying increased risk of serious health consequences and even death. The El Paso

County Coroner identified pepper spray as a contributing cause of the death of Andrew Spillane, a pre-trial detainee who died in the Jail in May, 2000. See paragraph 46.

35. Mental health patients, particularly those taking psychotropic medications, and those who are psychotic and highly agitated, are at particular risk of death while in restraints. At the Jail, restraints, including so-called "fetal position" restraints and the fully-immobilizing restraint chair, are used inappropriately on prisoners exhibiting sips of mental illness. In 1998, the ACA recommended that the Jail consider all restraints to be medical restraints, which would require that health care staff, rather than security staff, determine that restraint is appropriate. The defendants rejected this suggestion, and security staff continue to make the decision to place mentally ill prisoners in restraints, often without any subsequent evaluation by medical or mental health personnel to determine whether the situation warrants psychiatric intervention or other medical management.

Improper Delivery of Medications

36. Many class members depend on medications to help them maintain mental stability and the minimum level of social functioning that is required for them to follow the rules and instructions of Jail staff. When they are deprived of their necessary medications, and faced with the added stresses of incarceration, class members are at high risk of mental destabilization.

37. Monitoring of persons taking medications for their mental illness is critically important, both to ensure that the medication is having the desired therapeutic effect and to detect potentially serious side effects and toxicity. The Jail has insufficient staff and an inadequate system for effective monitoring of those who are taking medications, and class members have been and will in the future be harmed as a result.

38. Sudden or prolonged discontinuation of prescribed medications can have disastrous results. Before their arrest, many class members had medications prescribed by outside therapists to treat their mental illness, and these medications are taken away at arrest or booking into the Jail. However, the medication orders are not reinstated by the Jail's medical staff for long periods of time, sometimes for up to two weeks, putting class members who depend on their medications at high risk of mental destabilization.

39. Abrupt changes in medications can have seriously negative effects. The Jail's health care services provider maintains a formulary, a restrictive list of medications that are available for the Jail's physicians to prescribe. Many times, a specific medication that a class member was being treated with successfully outside the Jail is not available on the Jail's formulary. In that event, defendants force class members to accept an alternative medication that may not work as well for them. Frequently, the decision to switch prisoners to a new medication is made for monetary rather than medical reasons. When any change in medication is made, the Jail has an inadequate system for monitoring the therapeutic or toxic effects of the change.

40. Forced changes in medications are a particular problem for class members who have received psychiatric treatment at a state or local inpatient facility, and are then brought to the Jail. These class members are often stabilized on specific medications at the hospital, and then forced to switch to new medications at the Jail because the medications that hospital doctors used to stabilize them are not available on the Jail's formulary. The abrupt change in medication can lead to destabilization and injury.

41. The Jail's medication delivery system is inadequate, thus putting class members at risk that their prescribed medication will not be effective or will have increased toxicity. Medications that are supposed to be taken at 12-hour intervals

are delivered to the cellblocks as early as 4:30 a.m. and as late as 9:00 p.m. Some medications should be taken three or four times a day, but are given twice daily for the convenience of staff. Some medications should be taken with food, and some should be taken on a empty stomach, but the schedule of the medication carts is independent of the food delivery schedule. Some medications that are designed with special pharmaceutical coatings, and must be swallowed whole in order to have the intended effect, are crushed before dispensing to prisoners.

Tragic Consequences of Inadequate Mental Health Care

42. Prisoners in general have greater mental health needs than the free-world population, and the needs of jail prisoners are especially great. Having recently been arrested, many jail prisoners are experiencing withdrawal from alcohol and other substances. Facing the trauma of sudden arrest and incarceration, and the stress and uncertainty of a trial and a potentially lengthy prison sentence, many jail prisoners experience serious mental health crises that can explode into self harm, suicide attempts, or suicide. Combined with inadequate staffing of deputies to provide protection to Inmates at risk of self-harm, the many inadequacies in mental health services at the Jail have resulted in an epidemic of suicide attempts. Since 1995, when defendant Anderson took office as El Paso County Sheriff, there have been at least 142 suicide attempts in the Jail. There have been at least four successful suicides in that period, including two in 2001.

43. The following paragraphs set forth specific examples of how the acts and omissions of the defendants have led to, and pose a continuing risk of leading to tragic consequences for mentally ill prisoners in the Jail.

Michael Lewis, May, 1998

44. On May 7, 1998, five days after he first began hallucinating and displaying other signs of psychosis, pre-trial

detainee Michael Lewis died while struggling against the restraints on the Jail's restraint board. (See paragraph 1.)

Prisoner No. 1, April, 1999

45. Prisoner No. 1 was already visibly disturbed when she arrived at the Jail for an alcohol violation in 1999. She told deputies that she had recently been raped twice. She made suicidal statements, and deputies put her in an isolation cell. After she attempted to hurt herself, deputies stripped her naked, laid her face-down on the bare concrete floor, handcuffed her behind her back, and shackled her legs at the ankles. They returned to her cell 15 minutes later and strapped her into a restraint chair, still naked. A male deputy took a photograph, staring at her through the camera's viewfinder far longer than necessary for a simple Polaroid shot. For the next five hours she remained strapped in the chair, naked, in full view of the male deputies, and screaming in terror as she re-experienced the traumatic fear and helplessness she endured when she was held immobile and raped. Deputies paged the on-call mental health worker four separate times, but she did not arrive until more than 3 hours after the prisoner was strapped into the restraint chair.

Andrew Spillane, May, 2000

46. On May 10, 2000, pre-trial detainee Andrew Spillane died in the Jail as a result of seizures caused by delirium tremens and pepper spray. Mr. Spillane had arrived at the Jail at 7 am that morning, already displaying symptoms of psychosis as a result of alcohol withdrawal. Instead of being sent to the hospital or even the Jail's infirmary to receive immediate medical attention, he was housed in a regular cellblock of the Jail. The Coroner's report states that by mid-afternoon, he still had not received medical attention, and guards put him in a special detention cell "for his unruly behavior," which the Coroner said was caused by early stages of delirium tremens. By 5:20 pm, Mr. Spillane finally received some medication

and was transferred to the Jail's infirmary. But his delirium and agitation got worse. Jail deputies again treated his agitation as a behavioral problem instead of a medical one. They removed him from the Jail's infirmary and confined him again in a special detention cell, where his agitation increased. They decided to remove him from the special detention cell to put him in restraints. He was unable to obey their commands, however, and they pepper sprayed him. When the first dose had no effect, they sprayed him again. He died shortly afterwards.

Steven Phelps, March, 2001

47. Stephen Phelps arrived at the Jail in the early morning hours of March 23, 2001. The intake nurse learned of his past history of suicide attempts and reported that he was "elusive" to many questions in the initial psychiatric assessment. He was sent to the mental health cellblock with full suicide precautions, and the nurse sent a referral form to the mental health staff. Pursuant to that referral, Mr. Phelps was interviewed several days later by one of the Jail's "mental health professionals," an unlicensed counselor with no more than a bachelor's degree. At that time, the counselor determined that Mr. Phelps was not suicidal. She cleared him for transfer to the Jail's general population with a uniform, bedding, hygiene items, and all his permitted property. The form states "no other mental health services at this time." The next day, Mr. Phelps hanged himself with his bedsheet.

Brian Bennett, November, 2001

48. In the fall of 2001, Brian Bennett, a 22-year-old pretrial detainee with a diagnosis of bipolar disorder and schizoaffective disorder, was receiving antipsychotic and mood-stabilizing medication. In late October, however, while he was confined in the segregation unit under 23-hour-a-day lockdown for a disciplinary violation, he refused to continue taking his medication. On the morning of November 1, the

Jail's mental health staff decided to transfer him to an in-patient psychiatric hospital. There was no available bed, however, so he was placed on a waiting list. Instead of transferring him to the Jail's infirmary where he could have medical supervision, Jail staff left him confined in the segregation unit. On the afternoon of November 1, he hanged himself with his pants. Investigation revealed that the staff had failed to perform the required 15-minute checks.

Prisoner No. 2, November, 2001

49. In mid-November 2001, Prisoner No. 2, a pretrial detainee, was placed on "suicide watch" in the mental health cellblock at CJC. Nevertheless, without staff noticing or intervening, he broke off a piece of his artificial leg, sharpened the edge, and used it to cut his wrists. He then began climbing the stairs and, in a suicide attempt, plunged head first from an elevated portion of the mental health unit. He suffered serious injuries to his head and neck.

Prisoner No. 3, December, 2001

50. Prisoner No. 3, who has been diagnosed with bipolar disorder, was a prisoner in the CJC on December 29, 2001. Incident reports written by deputies state that at 7:45 pm, he reported hearing voices and said he was in crisis and becoming suicidal. The medical unit paged mental health workers, but they did not respond. More than two hours later, at 10:05, deputies made the decision to dress him in a suicide gown and lock him in a special detention cell while they awaited instructions from mental health. During the next hour, as deputies failed to conduct the required 15-minute checks, the prisoner's condition deteriorated. At 11:18, a deputy finally checked and reported that the prisoner had been smearing feces in the cell and had scrawled "I need the toilet" in feces on the window of the cell door. Deputies resumed their 15-minute checks, but they left the prisoner in the filthy toiletless cell for more than an hour. At 12:08, a

deputy noted that the prisoner again was "smearing feces on wall." Deputies did not intervene until 12:23, when the prisoner began cutting his arm with a metal switch plate cover that he managed to remove and then sharpened on the brick wall. The Jail's mental health staff never arrived. The prisoner was finally taken to the hospital, and then to the state mental hospital.

51. Over the next several weeks, Prisoner No. 3 bounced back and forth several times between the state mental hospital and the Jail. During his second stay at the jail, he became suicidal again and was placed in a different special detention cell, supposedly for his protection. In this cell, too, he managed to remove a metal cover plate, and he began cutting himself again. After returning again from the state hospital, he was placed in a medical holding cell at the-Metro facility, where he opened an electrical box and began cutting himself with a piece of wire. He was then moved to another special detention cell, where he managed to break a light bulb and started to cut himself with the broken glass. The prisoner was then placed in a restraint chair, where he-remained for the next 18 hours. Security guards, not mental health workers, made the decision to release him from the chair.

Prisoner No. 4, January, 2002

52. Prisoner No. 4 is a young woman who has been jailed and hospitalized numerous times as a result of her serious mental health problems. Her medical records show diagnoses of bipolar disorder with psychotic features and schizoaffective disorder. She has a history of multiple confinements in the Jail's special detention cells, has been in restraints multiple times, including at least one time in the Jail's restraint chair.

53. During a stay in the Jail in mid-January, 2002, the mental health staff determined that she should be sent to the state mental hospital, but she was placed on a waiting list

because there were no beds available. Instead of housing her in the infirmary under medical supervision, however, the Jail assigned her to the regular cellblock for female prisoners. Over the next several days, she manifested bizarre and dangerous behavior that confirmed the need for inpatient psychiatric care, which she did not receive.

54. Deputies decided she was suicidal. Without calling mental health, they took her clothes, gave her a suicide gown, and put her in a special detention cell. A few hours later, deputies determined that she was no longer suicidal. They released her from the special detention cell, again without consulting with mental health.

55. Three days, later, a deputy looked in her cell and reported that she was "lying on the floor, naked, covered in food and making engine noises." The spoon from the evening meal was missing. It was in her vagina. She was taken to the infirmary, where the spoon was removed. Her medical records show that she told the nurses that she heard voices that told her to put the spoon in her vagina. Instead of keeping her in the infirmary under medical observation, staff returned her immediately to the cellblock. Mental health was not contacted.

56. Upon return to the cellblock, deputies made the decision to put her in a special detention cell. She said she would scratch her eyes out. When she started to do so, deputies put her in restraints but did not call mental health. A few hours later, without consulting medical or mental health personnel, deputies determined that the threat had subsided, and they released her again into the regular cellblock.

57. The next day, an incident report states that she shoved a styrofoam food container into her vagina. A nurse and a mental health worker arrived that evening and administered medication but did not move her to the infirmary. Ultimately, she was admitted again to the state hospital.

FACTS RELATING TO NAMED PLAINTIFFS

Mark Shook

58. Plaintiff Mark Shook began receiving psychiatric care before he reached adolescence. He has been diagnosed as suffering from Asperberger's Syndrome, a form of autism, as well as bipolar disorder. Before he arrived at the Jail, he was regularly taking Zyprexa and Serzone prescribed by his psychiatrist. Once at the Jail, he went for several weeks without access to any medications. After three weeks, Shook finally saw the medical doctor, not a psychiatrist, who would not prescribe his regular medications because they were not on the Jail's formulary.

James Robillard

59. Plaintiff Robillard's medical records state that he was "actively suicidal" when he arrived in August, 2000. He has suffered from mood swings and has been diagnosed with bipolar disorder.

60. Before he was incarcerated, Plaintiff Robillard regularly took Paxil, which helped to control his symptoms. The Jail continued his prescription for the next eight months, on the condition that Robillard supply his own medications. By the spring of 2001, however, Robillard could no longer pay for the medications, and the Jail refused to continue the prescription. Robillard was referred to the Jail psychiatrist to recommend a different drug, and an accompanying note states "CMS will pay for the next 14 days of Paxil only." The decision to discontinue Paxil was not made for medical reasons.

61. In January, 2001, when Mr. Robillard received a sentence of two years, he lost control of his emotions. The Jail's incident report states that he said he would kill himself. As deputies tried to control him, he hit his head against the wall and cursed and cried. Deputies first placed Robillard in

full body "fetal position" restraints and then in the restraint chair for almost three hours. Although the incident report states that Mr. Robillard was suicidal, no medical or mental health personnel were involved in the decision to initiate or to discontinue the use of the restraint chair. No mental health worker arrived during the nearly three hours Robillard spent in the restraint chair.

62. Restraints are permissible only for the minimum amount of time that is necessary to control the emergency that justifies their use. The Jail's incident report fails to document a continuing need for use of the restraint chair. On the contrary, the deputies who performed fifteen-minute checks repeatedly noted nothing more than Mr. Robillard "sitting quietly."

Dennis Jones

63. Plaintiff Jones has been continuously confined in the jail since September, 2001. He has been diagnosed as bipolar, suffers from depression and anxiety, and has in the past considered suicide. Before he entered the Jail, he was prescribed a combination of Neurontin and valproic acid, which were successful in controlling his symptoms. For nearly a month after his incarceration he was denied any medication at all for his mental illness. When the Jail doctor finally gave him a prescription, he was limited to valproic acid only. The dosage he received was not sufficient to provide relief, but his request for an adjustment was refused. Blood samples taken for the purpose of monitoring the levels of his medication have been taken too soon or too long after his dose of medication, therefore rendering the blood test inaccurate and ineffective.

64. The named plaintiffs have diagnoses of serious mental illnesses that can require inpatient psychiatric care, and, if not properly treated, can lead to attempts at self-harm and suicide. As individuals with serious mental illness, the named

plaintiffs have been harmed in the past and face a substantial risk of harm in the future because of the custom, pattern, practice, and usage of the defendants challenged here.

DEFENDANTS' ACTIONS AND DELIBERATE INDIFFERENCE

65. The mental health needs of the Jail's prisoners have long been known to defendants and their staff, and defendants have full knowledge of the facts and the unconstitutional conditions set forth herein. In maintaining and failing to correct these conditions, defendants have acted, and continue to act, with deliberate indifference to plaintiffs' and the class' health, safety, and serious mental health needs, and to the risk that the named plaintiffs and the plaintiff class will suffer serious psychiatric harm, physical injury, or death.

66. In the course of litigation over the death of Michael Lewis on the Jail's restraint board, see Paragraph 1, the Jail's mental health system was evaluated by Richard Belitsky, M.D., of the Department of Psychiatry at the Yale University School of Medicine. In a written report submitted in 2001, Dr. Belitsky found "serious problems with the provision of mental health services at CJC," including inadequate mental health staffing, inadequate oversight of the mental health program, and inadequate provision for emergency psychiatric evaluation of prisoners. Defendants have received copies of Dr. Belitsky's report. They are aware of Dr. Belitsky's findings and of the circumstances he describes, but have taken little corrective action.

67. The former medical services provider requested additional funding to enhance health care staffing at the Jail, including mental health staffing, but the defendants repeatedly rejected such requests.

68. Defendants have been named in at least four lawsuits in which some or all of the Jail conditions as set forth herein

were described. They also received a notice of claim stating the facts alleged in paragraph 45.

69. The conditions of confinement set forth in this Complaint result in the unnecessary and wanton infliction of pain, physical and psychological injury and imminent risk of serious injury or of death that is unrelated to any legitimate penological purpose. Defendants have acquiesced in and ratified these conditions, which amount to an official custom or policy of the defendants.

INJUNCTIVE AND DECLARATORY RELIEF

70. An actual and immediate controversy exists between the plaintiffs and the defendants. Plaintiffs contend that the conditions of confinement described herein are unconstitutional. Defendants contend that the conditions of confinement described herein are constitutional. Plaintiffs and the class are therefore entitled to a declaration of rights with respect to this controversy.

71. Defendants have acted, and continue to act, under color of state law to deprive plaintiffs of their constitutional rights. Plaintiffs are suffering irreparable injury, and will continue to suffer irreparable injury, as a result of the conditions described in this Complaint, unless those conditions are enjoined by this Court. Plaintiffs have no plain, adequate or speedy remedy at law, and are entitled to injunctive relief against defendants pursuant to 42 U.S.C. § 1983.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

72. Each named plaintiff has exhausted all administrative remedies available to him.

FIRST CLAIM FOR RELIEF

(Violation of Eighth and Fourteenth Amendments)

73. Plaintiffs incorporate paragraphs 1 through 72, above.

74. By subjecting the named plaintiffs and the class members in their custody to the conditions set forth herein, with full knowledge of those conditions, defendants have acted, and continue to act, with deliberate indifference to their health, safety, and serious mental health needs, and have subjected them to cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

WHEREFORE, plaintiffs respectfully request that the Court:

75. Certify this action as a class action;

76. Enter a judgment declaring that defendants' actions described herein are unlawful and violate plaintiffs' and the plaintiff class' constitutional rights;

77. Permanently enjoin defendants, their subordinates, agents, employees, and all others acting in concert with them from subjecting plaintiffs and the plaintiff class to the conditions set forth in this Complaint;

78. Grant plaintiffs their reasonable attorney fees and costs pursuant to 42 U.S.C. § 1988 and other applicable law; and

79. Grant such other relief as the Court considers just and proper.

/s/ Mark Silverstein
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APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. ___

MARK SHOOK, JAMES ROBILLARD and DENNIS JONES,
on behalf of themselves and all others similarly situated,
Plaintiffs,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE
COUNTY OF EL PASO and JOHN WESLEY ANDERSON,
in his official capacity as Sheriff of El Paso County,
Defendants.

MOTION TO CERTIFY CLASS AND SUPPORTING AUTHORITIES

INTRODUCTION

This action is brought by Mark Shook, James Robillard, and Dennis Jones, three mentally ill prisoners confined in the El Paso County Jail in Colorado Springs, Colorado ("Jail"). Plaintiffs challenge, under the Eighth and Fourteenth Amendments to the United States Constitution, a number of serious inadequacies in the Jail's treatment of them and other Jail prisoners with serious mental health needs. Plaintiffs seek injunctive and declaratory relief only.

Plaintiffs now move the Court for an order certifying the following plaintiff class:

> All persons with serious mental health needs who ate now, or in the future will be, confined in the El Paso County Jail.

For the reasons set forth below, plaintiffs' motion should be granted.

ARGUMENT

I. GENERAL PRINCIPLES APPLICABLE TO CLASS CERTIFICATION.

In order for a class to be certified, the following requirements must be satisfied:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

In addition, the class must meet the requirements of one of the three subsections of Rule 23(b). Here, plaintiffs seek certification pursuant to subsection (b)(2).

Initial determination of class certification is solely a procedural issue which must not be based on the merits of the case; plaintiffs' burden is limited to demonstrating that the proposed class satisfies the requirements of Rule 23. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974); *Anderson v. City of Albuquerque*, 690 F.2d 796, 799 (10th Cir. 1982). In ruling on the motion for class certification, the Court must take the substantive allegations of the complaint as true. *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1290 n. 7 (10th Cr. 1999). Even if the Court has some doubt, it should err in favor of class certification. *Esplin v. Hirschi*, 402 F.2d 94, 101 (10th Cir. 1968).

II. RULE 23(a) PREREQUISITES TO CLASS CERTIFICATION HAVE BEEN SATISFIED.

A. *Impracticability of Joinder—Rule 23(a)(1)*

Rule 23(a)(1) requires that "the class [be] so numerous that joinder of all members is impracticable." To meet this requirement, a plaintiff need only demonstrate that joinder of all class members is impractical, not impossible. *Rodriguez v. Bar-S Food Co.*, 567 F. Supp. 1241, 1247 (D. Colo. 1983). Courts do not require precise identification of class members before finding that joinder is impracticable. *Horn v. Associated Wholesale Grocers, Inc.*, 555 F.2d 270, 276 (10th Cir. 1977).

Plaintiffs ask the Court to certify a class comprising "all persons with serious mental health needs who are now, or in the future will be, confined in the El Paso County Jail."[1] There can be no doubt that this class satisfies the requirements of Rule 23(a)(1). The Jail's population regularly exceeds 1,000, and has been as high as 1,139. Complaint, ¶ 20. Of these more than 1,000 prisoners, approximately 20% have serious mental health needs. *Id.*, ¶ 23. Thus, based only on the current size of the class, the requirements of Rule 23(a)(1) are satisfied. "In light of prevailing precedent, the difficulty inherent in joining as few as 40 class members should raise a presumption that joinder is impracticable, and the plaintiff whose class is that large or larger should meet the test of Rule 23(a)(1) on that fact alone." *Newberg and Conte, Newberg on Class, Actions*, § 3.05, at 3-25 (3d ed. 1992)

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[1] Deliberate indifference by prison officials to a prisoner's serious medical need constitutes cruel and unusual punishment in violation of the Eighth Amendment." *Brown v. Zavaras*, 63 F.3d 967, 970 (10th Cir. 1995). "Serious medical needs" include psychological disorders. *See id.* (prisoner's allegation that he was denied treatment for gender dysphoria states Eighth Amendment claim; *Torraco v. Maloney*, 923 F.2d 231, 234 (1st Cir. 1991) ("deliberate indifference to an inmate's serious mental health needs violates the eighth amendment").

(hereinafter "Newberg"). *Accord, Jones v. Diamond*, 519 F.2d 1090, 1100 n. 18 (5th Cir. 1975) (reversing denial of motion to certify class of 48 jail prisoners); *Clarkson v. Coughlin*, 145 F.R.D. 339, 348 (S.D.N.Y. 1993) (certifying a sub-class of seven deaf and hearing-impaired female prisoners).

But the proposed class includes not only persons with serious mental health needs currently in the Jail, but future Jail prisoners as well. The fluid nature of the class, and the inclusion in the class of future prisoners, whose identities obviously cannot now be ascertained, makes joinder of all class members not just impracticable but literally impossible. *See Hawker v. Consovoy*, 198 F.R.D. 619, 625 (D.N.J. 2001) (finding class certification appropriate for prisoners seeking injunctive relief; joinder of future class members is impracticable).

Indeed, it is primarily for this reason that injunctive challenges to conditions of confinement in prisons and jails, like the present case, invariably proceed as class actions. In an action by deaf prisoners, challenging the failure of prison officials to accommodate their special needs, the court said the following:

> The class action device is particularly well-suited in actions brought by prisoners due to the fluid composition of the prison population. Prisoners frequently come and go from institutions for a variety of reasons. Veteran prisoners are released or transferred, while new prisoners arrive every day. Nevertheless, the underlying claims tend to remain. Class actions therefore generally tend to be the norm in actions such as this.

Clarkson v. Coughlin, 783 F. Supp. 789, 797 (S.D.N.Y. 1992) (citations, internal quotation marks omitted). *See also Monaco v. Stone*, 187 F.R.D. 50, 61 (E.D.N.Y. 1999) (fluidity of class of prisoners makes certification particularly appropri-

ate); *Dean v. Coughlin*, 107 F.R.D. 331, 332 (S.D.N.Y. 1985) ("a prison population is particularly well-suited for class status"); *Andre H. v. Ambach*, 104 F.R.D. 606, 611 (S.D.N.Y. 1985) ("The fact that the [detention center] population . . . is constantly revolving establishes sufficient numerosity to make joinder of the class members impracticable"); *Green v. Johnson*, 513 F. Supp. 965, 975 (D. Mass. 1981) (certifying class of prisoners "in light of the fact that the inmate population at these facilities is constantly revolving").

B. *Commonality and Typicality—Rule 23(a)(2) and (3)*

Rule 23(a)(2) requires that there be a question of law or fact common to members of the class. Rule 23(a)(3) requires that the named plaintiffs' claims be typical of those of the class. In practice, the requirements of commonality and typicality tend to merge. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157 n. 13 (1982); *see also Bradley v. Harrelson*, 151 F.R.D. 422, 426-27 (M.D. Ala. 1993) (considering commonality and typicality requirements together).

Rule 23(a)(2) requires only a single issue common to the class. *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1288 (10th Cir.1999). Moreover, "there is no requirement that every class member be affected by the institutional practice or condition in the same way." *Bradley*, 151 F.R.D. at 426 (finding that typicality and commonality requirements were satisfied in a challenge to prison mental health care, even though the nature and severity of mental illness suffered by individual prisoners differed). "When the class is united by a common interest in determining whether the defendant's course of conduct is, in its broad outlines actionable, differences in the class members' positions should not defeat class certification." *Leyva v. Buley*, 125 F.R.D. 512, 515-16 (E.D. Wash. 1989).

In this case, the named plaintiffs allege that Jail officials act, or fail to act, with deliberate indifference to their serious mental health needs in a variety of ways, in violation of the Eighth and Fourteenth Amendments to the United States Constitution. Thus, there are numerous questions of fact raised by the named plaintiffs that are common to all members of the class of Jail prisoners with serious mental health needs. These include, but are not limited to, whether mental health staffing at the Jail falls below minimal requirements; whether custody staff at the Jail are inadequately trained to recognize and respond to signs of mental illness; whether the Jail's system for providing psychotropic medications is inadequate; whether overcrowded physical facilities contribute to mental health problems; and whether the use of or threat of undue force is medically appropriate. Moreover, all class members are confined in a single institution, whose practices and policies are challenged. They are subject to the same risks, the same treatment shortcomings, and the same abuses. In addition, the nature of the defendants' actions and inactions is a question which pervades all the claims and applies to each class member in the same way.

Likewise, the controlling questions of law are common to the entire class. These include the scope of protection provided to prisoners under the Eighth and Fourteenth Amendments; the interpretation of the "deliberate indifference" requirement in light of the defendants' acts and omissions; (3) the legal effect of standards established by various professional organizations; and (4) the standards of care required in the jail setting. The commonality requirement is satisfied here.

The purpose of the typicality requirement is to ensure that the interests of the named plaintiffs align with the interests of

the class. *Weinberger v. Thornton*, 114 F.R.D. 599, 603 (S.D. Cal. 1986). According to the leading treatise,

> Typicality refers to the nature of the claim or defense of the class representative and not to the specific facts from which it arose or to the relief sought. Factual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory.

Newberg, § 3.15, at 3-78. *See also Adamson v. Bowen*, 855 F.2d 668, 676 (10th Cir. 1988) ("differing fact situations of class members do not defeat typicality under Rule 23(a)(3) so long as the claims of the class representative and class members are based on the same legal or remedial theory"); *Penn v. San Juan Hospital, Inc.*, 528 F.2d 1181, 1189 (10th Cir. 1975) (same).

In this case, the claims of the named plaintiffs are typical of those of the class. The named plaintiffs are "part of the class and possess the same interest and suffer the same injury as the class members." *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977). The claims of all class members are founded on the same legal theory: that defendants' deliberate indifference to their serious mental health needs violates the Eighth and Fourteenth Amendments. To the extent that the named plaintiffs are injured by inadequacies in the Jail's mental health system, other members of the class of prisoners with serious mental health needs suffer similar injury. To the extent that the named plaintiffs receive injunctive or declaratory relief, all class members will benefit from that relief.

C. *Adequacy of Representation—Rule 23(a)(4)*

Adequacy of representation is a two-part test: (1) counsel for the representative parties are qualified and able to prosecute the action vigorously; and (2) there is no conflict or

antagonism between the named plaintiffs' interests and the remainder of the class. *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978).

There can be no doubt about the competence of plaintiffs' counsel. Plaintiffs are represented by lawyers from the ACLU of Colorado and the ACLU National Prison Project, who have extensive experience in civil rights, class action, and prison and jail conditions litigation. Moreover, the named plaintiffs do not have any antagonistic or conflicting interests with the unnamed class members. Thus, the requirements of Rule 23(a)(4) are satisfied.

D. *Need For Certification if Relief is To Be Had*

Finally, courts have recognized that prisoners, "by reason of ignorance, poverty, illness, or lack of counsel may not [be] in a position to seek [relief] on their own behalf," and that this factor militates in favor of class certification. *United States ex rel. Morgan v. Sielaff*, 546 F.2d 218, 222 (7th Cir. 1976). This is even more clearly true of the population at issue here: prisoners with serious mental health needs. Thus, courts have often certified classes consisting of mentally ill prisoners. *See, e.g., Bradley*, 151 F.R.D. at 423 (certifying class consisting of "all acutely and severely mentally ill inmates who are presently incarcerated at the Kilby Correctional Facility or who will be incarcerated there in the future"); *Anderson v. Coughlin*, 119 F.R.D. 1, 2, 3 (N.D.N.Y. 1988) (certifying class including "all inmates at Green Haven and Auburn Correctional Facilities who suffer from a mental illness," and citing similar decisions).

III. CLASS CERTIFICATION IS APPROPRIATE PURSUANT TO RULE 23(b)(2).

Certification is appropriate pursuant to Rule 23(b)(2) when

> the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby

> making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

"It is well-established that civil rights actions are the paradigmatic 23(b)(2) class suits, for they seek classwide structural relief that would clearly redound equally to the benefit of each class member." *Marcera v. Chinlund*, 595 F.2d 1231, 1240 (2d Cir.) (allowing class certification in suit seeking visitation for jail prisoners), *vacated on other grounds*, 442 U.S. 915 (1979). *See also Elliott v. Weinberger*, 564 F.2d 1219, 1229 (9th Cir. 1977) (action to enjoin allegedly unconstitutional government conduct is "the classic type of action envisioned by the drafters of Rule 23 to be brought under subdivision (b)(2)"), *affd in pertinent part sub nom. Califano v. Yamasaki*, 442 U.S. 682, 701 (1979). As stated in the leading treatise:

> Rule 23(b)(2) was drafted specifically to facilitate relief in civil rights suits. Most class actions suits in the constitutional and civil rights areas seek primarily declaratory and injunctive relief and therefore readily satisfy Rule 23(b)(2) class action criteria.

Newberg, § 25.20 at 25-33 (3d ed. 1992).

Here, there can be no dispute that defendants have "acted or refused to act on grounds generally applicable to the class," and that the declaratory and injunctive relief plaintiffs seek will redound to the benefit of the entire class of Jail prisoners with serious mental health needs.

CONCLUSION

For all the reasons set forth above, the Court should certify the proposed plaintiff class.

D.C.Colo.LR 7.1 Conference

Plaintiff's counsel has not consulted opposing counsel with respect to this motion because no counsel has yet appeared.

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